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OFFICE SUPREME COURT U. S.
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United States Supreme Court.

OCTOBER TERM, 1882.

THE INHABITANTS OF THE TOWNSHIP OF MONTCLAIR, IN THE COUNTY OF ESSEX,
Plaintiffs in Error,

vs.

THOMAS RAMSDELL.

No. 147.

In Error to the Circuit Court of the United States, for the District of New Jersey.

BRIEF FOR PLAINTIFFS IN ERROR.

NEWARK, N. J.:
WARD & TICHENOR, LAW CASE PRINTERS, 832 & 834 BROAD ST.
1882.

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This writ of error removes to this Court the judgment of the Circuit Court of the United States, for the district of New Jersey, rendered in an action brought July 8th, 1876, to recover on bonds and coupons alleged to have been issued by the plaintiffs in error, in aid of the Montclair Railway. The declaration commences on page 2 of the record, and has many counts, founded on such alleged bonds and coupons, and one *indebitatus* count for interest.

The first ten counts are on ten bonds for $1,000 each, payable on the first of November, 1873, and on two coupons for $35 each; one due May 1st, 1873, and one due November 1st, 1873. (Record, pages 2 and 3.) In each one of these counts it is alleged that the First National Bank of New London, before May 1st, 1873, became, for a valuable consideration by it paid in the public market, and then was the holder and bearer of the said bond and interest coupons; and that before the commencement of the suit, plaintiff became, for a valuable consideration by him paid to the First National Bank of New London, the holder and bearer of said bonds and interest coupons.

Of the remaining special counts, fifty-four are on interest coupons on similar bonds, the principal sums of which had not yet matured, and which by allegations similar to the counts on the bonds, are alleged to have been obtained by plaintiff of The Bond Street Savings

Bank, (Record, pp. 17 to 67,) and are each for the amount of one coupon, $35.

Seven more counts from pages 67 to 81 of the record, are on coupons on other similar bonds alleged in like manner to have been acquired by plaintiff from The Windham National Bank of Windham, Connecticut; these counts are for $245 each.

The seven remaining special counts, from pages 81 to 94, inclusive, are on coupons on other similar bonds, of which plaintiff alleges he has become, for valuable consideration by (it) (meaning him) in public market paid, the holder and bearer before May 1st, 1873; these are also for $245 each.

To all these special counts defendants pleaded *non est factum*, and to the one for interest, *nil debet*. (Page 94.)

Judgment was rendered November 16, 1878, on the verdict of a jury, for

Debt	$15,530 00
Damages	5,121 21
Costs	855 28
Total	$21,506 49

(Record, page 95.)

The bonds thus recovered on were issued under color of an act of the legislature of New Jersey, entitled "An act to authorize certain townships, towns and cities to issue bonds, and to take the bonds of the Montclair Railway Company." This act was approved April 9, 1868, and is copied at length in the record, pages 101 to 105.

The Montclair Railway Company was chartered by an act of the legislature of New Jersey, approved March 18, 1867, as found on pages 96 to 98 of the record.

The township of Montclair was created by setting off a part of the township of Bloomfield into a new township by an act approved April 15, 1868, and is found on page 99 of the record. The title to said act is erroneously quoted in the record. The true title is: "An act to set off from the township of Bloomfield, in the county of Essex, a new township, to be called the township of Montclair," as will be seen by a reference to the

Pamphlet Session Laws of New Jersey for 1868, on page 998.

A supplement to the Bonding Act, passed March 27, 1874, is found on page 105 of the record.

The assignment of errors returned with the writ of error in this case is on pages 225 to 230, inclusive.

The bonds in question were issued by the commissioners assuming to act for Montclair township, on or about March 18, 1870.

Testimony of Hiram B. Littell, page 170.

I.

The first ground on which plaintiffs in error rely for the reversal of this judgment, is that there was no lawful authority for the issuing of bonds of the township of Montclair in aid of the Montclair Railway.

The question is raised on the following assignments of error, found on pages 228 and 229 of the record :

Twenty-third. There is also error in this, to wit, for that the said Judge in said case in delivering his charge to the jury, instructed the jury that full authority and power are found in the act of April 19th, 1868, entitled "An act to authorize certain townships, towns and cities to issue bonds and take the bonds of the Monclair Railroad Company," for the township of Montclair, although subsequently created, to issue the bonds in controversy.

Twenty-sixth. There is also error in this, to wit, for that the said Judge further charged the jury that the proviso of the third section of the act of the legislature of New Jersey, approved April 15, 1868, entitled "An act to incorporate the township of Montclair," was not in conflict with the constitution of the State of New Jersey.

Thirtieth. There is also error in this, to wit, for that the said Judge at said trial refused to charge the jury, as requested by defendants' counsel, that the act of April 9, 1868, entitled "An act to authorize certain townships, towns and cities to issue bonds and take the bonds of the Montclair Railway," could furnish no authority

either for the appointment of commissioners to borrow money on the faith and credit of the township of Montclair, or to issue bonds therefor, and that the provisions of said act are not applicable to said township.

Thirty-first. There is also error in this, to wit, for that the said Judge on said trial refused to charge the jury as requested by defendants' counsel, that so much of the act of April 15th, 1868, creating the township of Montclair, as attempted to impose on the township a liability to be bonded under the provisions of the act of April 9th, 1868, above referred to, is in conflict with the constitution of the State of New Jersey, and therefore void.

Thirty-third. There is also error in this, to wit, for that the said Judge, at the said trial, refused to charge the jury as requested by defendants' counsel, that the appointment of commissioners for Montclair township under said act, if any such appointment was made, was without warrant of law and was void.

These assignments of error present the same question argued in the Dana case, and the argument there presented is repeated here.

It is scarcely necessary at this day and in this Court to cite authorities to the point, that without legislative authority, bonds such as these are invalid even in the hands of an innocent and (in other respects) *bona fide* holder.

A municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing in such bonds must take notice at their peril.

Town of S. Ottawa vs. *Perkins*, 4 Otto, 262, and cases there cited.
Marsh vs. *Fulton Co.*, 10 Wall., 676.
Pendleton vs. *Amy*, 13 Wall., 304.
St. Joseph Township vs. *Rogers*, 16 Wall., 659.

In *Township of East Oakland* vs. *Skinner*, 94 U. S., 258, this Court said, "We have held that there can be no *bona fide* holding when the statute did not in law author-

ize the issue of the bonds. The objection in such cases goes to the point of power."

County of Daviess vs. *Huiderkoper*, 98 U. S., 98.
Anthony vs. *County of Jasper*, 101 U. S., 693.
Wells vs. *Supervisors*, 102 U. S., 625.
Dillon on Municipal Corporations, §426, p 413.
Daniell on Negotiable Instruments, 3d ed., §1538.

We are brought then to the question, whether there existed competent legislative authority to justify the issue of the bonds.

A. Can it be found in the bonding act?

The first section of the Bonding Act of 1868 is as follows: (Record, p. 100.) "Be it enacted by the Senate and General Assembly of the State of New Jersey, That on the application in writing of twelve or more freeholders, residents of any township, town or city along the routes of the Montclair Railway Company, or at the termini thereof, (*except the township of Bloomfield in the County of Essex, which township is hereby excepted from the operation of* ALL THE PROVISIONS *of* this act,) it shall be the duty of the Judge of the Circuit Court of the county wherein such freeholders reside, within ten days after receiving such application, to appoint under his hand and seal, not more than three freeholders, residents of such township, town or city, to be commissioners thereof, to carry into effect the purposes and provisions of this act; said commissioners shall hold their offices respectively for the term of five years and until others shall have been appointed."

The second section limits the amount to be borrowed to twenty per centum of the real estate of the townships, to be ascertained by the assessment rolls thereof for the year 1867, and requires the previous consent in writing, of persons owning at least two-thirds of the real estate of the township borne on the last assessment roll thereof, at the valuation thereon appearing.

By the first section it is clear that the township of Bloomfield "is excepted from the operation *of all the provisions*" of the act.

It is claimed, however, that under the operation of the fourteenth section of the act (page 104 of the record), Montclair, which is a new township, is made liable to the provisions of the act. That section is as follows:

"And be it enacted that in case any new township, "town or city, shall have been created, or the boundaries "of any township, town or city, shall have been enlarged "on the routes of said railway, or at the termini there- "of, so that there is no assessment roll for the year "eighteen hundred and sixty-seven, for such township, "town or city so created, or enlarged, the said commision- "ers for such new or enlarged township, town or city, "shall cause to be prepared an assessment roll for the "purposes of this act, by extracting from any assessment "roll or rolls of persons or property in the territory "embraced in the said new township, town or city so "created, or in said enlargement."

It may well be doubted whether the words "shall have been," as used in the section, are prospective, or whether they will not be construed to relate only to past transactions.

In *Jackson* vs. *Chapman*, 3 Cow., 390,

The statute read, "where any person or persons shall have settled" upon certain lands, and the Court held that the language had a retrospective effect only, and only related to persons who had settled on the lands when the law was passed.

This ruling was followed in *Jackson* vs. *Caywood*, 7 Wend., 246.

This view is fortified by the fact that the law went into immediate operation, and the language of the 14th section is *in presenti*, not *in futuro*.

"In case any new township * * * * shall have been created * * * * so that there is no assessment roll for the year 1867, for such township * * * so created."

If the draughtsman had had a different purpose, he would have written "shall have been, or shall be ~~en-acted~~ created," and "there is *or shall be* no assessment roll for the year 1867; and territory embraced *or to be embraced*—and township so created, *or to be created.*"

The 14th section undoubtedly had reference to the township of Little Falls; the act to create which was before the legislature when the bonding act was introduced, and was actually passed on the second of April, 1868, some days before the bonding act became a law. (Record, page 208.) The difference between Little Falls and Montclair is this, one was created *prior* to the passage of the bonding act, and the other was created *subsequently*, and from territory specially excepted from its operation.

We do not, however, rest our construction of the 14th section on so narrow ground as that; but assuming that it was prospective in its operation, and applied to townships to be created in the future, we contend that it does not authorize the bonding of a township to be created from Bloomfield, which was expressly excepted from all the provisions of the act.

This is purely a question of legislative intent, to ascertain which the whole must be construed together, and so construed as, if possible, to give effect to every part of it.

It will be observed that the act is territorial in its operation. By the fourth section it is provided that the taxes necessary to secure the payment of these bonds are to be assessed only on the real property of the township.

When, therefore, Bloomfield was excepted from the operation of all the provisions of the act, it was a clear

legislative declaration that no real estate within the territorial limits of that township should be liable to be taxed for the purpose in question.

Some reason must have existed to induce the legislature to declare this township exempt from the operation of the act. Can any be suggested founded on the idea that such land would only remain exempt while it was in a territory called by the name of Bloomfield?

To illustrate, suppose instead of setting off a part of Bloomfield into the new township of Montclair, the legislature had made a slight change in the boundaries of Bloomfield, so as to enlarge its area. It would then have come within the language of the 14th section, "if the boundaries of any township, town or city shall have been enlarged." Can it be fairly contended that this circumstance would have operated to repeal the previous exception of Bloomfield?

Or further, if either with or without the enlargement of its boundaries, the name of the whole township had been changed to Montclair, would that have repealed the exception? Clearly not.

Such a construction would make the legislative exception to depend on the corporate name bestowed on the territory, which would be absurd.

And so, if the township were altered into a city or town corporate. Change of name or function does not alter "vested debts and rights."

Would it not remain, if the township were divided into two or more new townships?

Mount Pleasant vs. *Beckwith*, 100 U. S., 514.

And if it continue for the *whole* territory, when thus divided, why not for a *part*, when set off as a new township?

In New Jersey, the settlement of a pauper follows the the land, in the division of a township. (10 N. J. L., 59; 32 N. J. L., 66.)

The constitution of the State declares that the commission of a justice of the peace shall become vacant, upon his ceasing to reside in the township for which he was elected. But, it has been held that this does not apply to a justice who is set off in a new township, which is part of the one for which he was elected. (31 N. J. L., 42.)

Trustees of Academy vs. *Erie*, 31 Pa. St., 515.

STRONG, *J.*: "There is no doctrine better settled, than that a change in the form of government of a community does not *ipso facto* abrogate existing law, either written or unwritten. . . . The act of Assembly converting a borough into a city did not, therefore, of itself and in the absence of express provisions to that effect, either repeal the former acts of Assembly relative to the borough, or annul existing ordinances."

If, then, a change in the name of the whole territory of Bloomfield would not operate to repeal the exemption much less would such an effect follow a change in the name of only a part.

No reason can be suggested why the legislature after carefully excepting the whole of Bloomfield from all the provisions of the act, (which of course included as well the provisions of the 14th section,) should immediately in the same act, declare that a part of that territory should become subject to the act if it was created into a new township and called by a new name

The object of the 14th section was, manifestly, only to provide for a mode of executing the act in cases where a change in the constitution of any township *subject to the act* should have rendered the mode previously provided ineffectual. It cannot fairly be construed to enlarge the scope of the act so as to include townships not previously made liable.

Any other construction will render the 14th section repugnant to the exception contained in the first section. Such an interpretation will violate well settled rules of construction of statutes.

Therefore, if an act is susceptible of two constructions, one which will make the whole statute effectual, and the other will make two parts repugnant, the Court will so construe the act as to give effect to the whole.

It is also a well established rule of interpretation that general words shall not be allowed to overturn those which are particular, nor to repeal a positive prior exception.

We refer to the following authorities :

Sedgwick on Stat. and Const. Law, 97.

"It is laid down as a rule, that a general statute without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent.

"The reason and philosophy of the rule is, that where the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions; unless it is absolutely necessary to give the latter act such a construction, in order that its words may have any meaning at all."

Comyn's Dig., (Parl R. 9, a.) "A later statute, general and affirmative, does not abrogate a former which is particular."

Potter's Dwarris on Statutes, 113 n; 154–160.

1 *Dill. on Munic. Corp.*, § 54.

"If both the general and special acts can stand, they will be construed accordingly. If one must give way it will depend upon the supposed intention of the lawmakers, to be collected from the entire course of legislation, whether the charter is suspended by the general statute, or whether the special charter provisions apply to the municipality in exclusion of the general enactments."

William vs. *Pritchard*, 3 Durn. and East., 2, (1790).

An act of parliament had authorized individuals to inclose and embank portions of the soil under the river Thames, and had declared that such land should be "free from all taxes and assessments whatsoever." The Land Tax Act subsequently passed, by general words embraced all the land in the kingdom, and the King's Bench held that it was illegal to tax such reclaimed land.

The State vs. *Morristown*, 4 Vroom, 61.

The Court held that the general law of 1851, in relation to sidewalks, did not apply to cities and towns which had special chartered privileges upon the subject; that "general legislation must give way to the special legislation on the same subject." The Court further said: "It is a question of intention."

The State (M. & E. R. R. Co., pros.) vs *Commissioners of R. R. Taxation*, 8 Vroom, 230.

DEPUE, *J.*: "Repeals by implication are not favored. But the question is always one of legislative intent, and the intent to abrogate the particular enactment in an earlier statute by a general enactment in a later statute, is sufficiently manisfested where the provisions of the two enactments are so inconsistent that they cannot stand together. The language of this section, that all taxation upon all railroad companies occupying and using railroads in this State, whether as lessees or otherwise, shall hereafter be made as follows, is so general and comprehensive that the legislative intent is left in no doubt."

In the same case, when carried to the Court of Errors and Appeals, (9 Vroom, 475,) it was held, "A general repealer in a general tax law cannot disturb the provisions of a special charter, because they are wholly different, they are not inconsistent; they may both stand independent of each other. They become inconsistent when the general law, by clear expression, is made to embrace and is applied to the particular corporation, and its inconsistent provisions are then brought within the

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reach of a general repealer. There is nothing in the cases in 1 Vroom, 113 and 369, which is not in harmony with this doctrine. If the prior clauses of a general law apply in express terms to a special corporation, a general repealer would necessarily repeal inconsistent provisions in the special charter. But if there is an absence of such express prior references there must be a special repealing clause to make a general law applicable to such particular corporation."

Ottawa vs. *LaSalle Co.*, 11 Ills., 654, (1851).

The town of Ottawa had, by its charter, power to license and regulate groceries, and to retain the license fees A subsequent general law provided that such fees should be paid to the county. The Court held, "The earliest statute continues in force, unless the two are clearly inconsistent with and repugnant to each other; or unless, in the latest statute, some express notice is taken of the former, plainly indicating an intention to repeal it."

St. Martin vs. *New Orleans*, 14 La. Ann., 113.

Two acts in relation to the government of New Orleans were passed on the same day. One of them fixed the salary of the officer known as the Register of Voters at a definite sum; while the other allowed the Common Council to determine the compensation of all the city officials. "The minute and particular provisions of the legislature, prescribing the salary of the Register, and the only mode in which it may be changed even by the legislature itself, cannot, we think, be held to be repealed by a subsequent general grant of power to the Common Council in relation to all city salaries, in an act approved at the same time."

Crane vs. *Reeder*, 22 Mich., 334, (1871).

The legislature had passed two acts, on the same day, upon the subject of escheats. One was special, while the other formed a part of the revised statutes.

"The special must be taken as intended to constitute an exception to the general act or provision; especially

when such general and special acts or provisions are contemporaneous—as the legislature are not presumed to have intended a conflict."

Bowen vs. *Lease*, 5 Hill., 221, (1843).

The invariable rule of construction in respect to repealing statutes is, that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other, or unless, in the latest act, some express notice is taken of the former, plainly indicating an intention to abrogate it."

In the matter of *Egypt Street*, 2 Grant's Cas., (Pa.) 455, (1854,) it was provided, by statute that thereafter "It shall not be lawful to open any street, lane, alley or public road, through any burial ground or cemetery within this commonwealth." A later act extending the limits of the borough of Norristown, empowered commissioners to survey and lay out and mark the lines of such streets, roads, lanes and alleys, as they deem necessary within the said limits." By the Court: "Here there is no inconsistency or repugnancy. The one act directs the commissioners to mark the lines of such streets, roads, lanes and alleys as they deem necessary in a certain part of the borough limits; the other forbids their entry upon burial grounds or cemeteries."

Shinn vs. *Commonwealth*, 3 Grant's Cas., (Pa.) 207, (1856.)

"Both acts were passed at the same session of the General Assembly, and the absence of any repealing clause, referring in terms to the prior act, is strong evidence that the legislature did not intend its repeal."

In *Edrick's case* (5 Co., 118,) the Judges said: "They ought not to make any construction against the express letter of the statute; for nothing can so express the meaning of the makers of an act as their own direct words; for *index animi sermo.*"

"The good expositor," says Lord Coke, (case of *Leases*,

5 Rep., 6,) "makes every sentence have its operation to suppress all the mischief; he gives effect to every word in the statute; he does not construe it so that anything should be vain and superfluous, nor yet makes exposition against express words, for *viperina est expositio quæ corrodit viscera textus*, but so expounds that one part of the act may agree with the other, and all may stand together."

Potter's Dwarris on Statutes, 144; Rule 12. *Ib.*, 236. "'Though the words be general,' says the ancient Plowden, 'they are to be reduced to a particularity made according to the intent of the act.' . . Where particular words are followed by general ones, the latter are to be held as applying to persons and things of the same kind with those which precede."

Sedgwick on Stat. & Const. Law, 360. "A thing which is given in particular shall not be taken away by general words." (*Standon* vs. *Univers. of Oxford*, 1 Jon. 26.)

Riddell vs. White, 1 Anstr., 281. An enclosure act directed certain lands to be sold *tithe free;* but made a general reservation in favor of the rights of certain parties therein.

The rector of the parish asked that the purchasers should account to him for the tithes; his right thereto being, as he claimed, within the saving clause.

MACDONALD, C. B.: "The saving clause in the act of Parliament in this case has been argued to destroy the effect of the prior enacting clause, which frees the land in question from the payment of tithe. We are of opinion that it cannot have that force. It falls within the general rule, that a saving repugnant to the purview of the instrument is void."

Rex vs. *Poor Law Commissioners*, 6 A. & E., 7. The 15th and 21st sections of the Poor Law (4 & 5 W. IV., c. 76,) enacted that, except as therein otherwise provided, the powers granted by former statutes upon the

same subject should not be suspended, and "shall in future be exercised by the persons authorized by law to exercise the same."

The 39th section gave to the commissioners the right to interfere in the administration of the existing laws "in *any* single parish;" and that, in such case, new officers should be elected, and should act, in the manner required by the new statute.

COLERIDGE, J.: "What [the Legislature] has clearly said in one part must be the best evidence of what it has intended to say in the other. . . It seems to me that the general words of the [39th] section in question must receive a constrained construction."

De Winton vs. *Mayor of Brecon*, 26 Beav., 533.

An act of Parliament gave to a municipal corporation the power to buy lands for a market. One section ordered the surplus lands so purchased to be sold in a certain way within a limited period. And a subsequent section authorized, by general words, the sale of *any* lands belonging to the corporation.

Sir JOHN ROMILLY, M. R.: "The general clause does not control the specific enactments. . . My opinion is that this general clause must be used consistently with the [prior] clause, which directed particular lands of this corporation to be sold in a particular manner, and this general clause must be construed to apply to the rest of the land of the corporation."

The State (Bartlett, pros.) vs. *Trenton*, 38 N. J. L., 64. The 83d section of a new charter for the city of Trenton provided two distinct remedies for the collection of certain unpaid assessments; while the 109th section declared that "nothing in this act contained shall be construed so as to destroy, impair or take away any right or remedy given by any act hereby repealed."

The prosecutor of a writ of *certiorari* insisted that, in

the event of a sale of his land under the 83d section, he would be deprived of his right to a trial by jury,—to which he claimed that he was entitled under the 109th section.

VAN SYCKEL, J.: "The legislature must be presumed to have intended what it expressly stated, rather than that which might be inferred from the use of general terms. If, therefore, the proviso of the 109th section is so comprehensive as to embrace the right of trial by jury, it cannot defeat the prior expressed grant of authority to the city to elect between the specified remedies."

Dickerson vs. *Nelson*, 4 Ind., 283. "The ambiguous phrase, with which the 8th section concludes, can have no weight against the explicit language of the precedent matter. If that phrase cannot be reconciled, it must fall."

The State vs. *Williams*, 8 Ind., 192.

Commonwealth vs. *Montrose*, 52 Pa. St., 391. STRONG, J.: "The language of [the 30th] section is, 'that the burgess and town council of *any* borough shall have power, and by virtue of this act are directed and required,' &c. . . The words used are broad, and if they are to be taken without reference to the other sections of the act, they are sufficiently comprehensive to embrace every description of borough within the commonwealth. . . The 1st section enacts 'that every borough within this commonwealth that *hereafter* may be incorporated, . . shall have' certain powers, describing them. . . Every provision [of the succeeding sections] undoubtedly refers to no other boroughs than those that might be incorporated after the passage of the act. . . If the subject matter is any guide to the meaning of the legislature, it leads here to the conclusion that the phrase '*any* borough' signifies any one described in the first section."

If, then, it is clear from the above authorities that had the provisions of the 14th section been enacted in a subsequent law, or in a separate law passed on the same day, they would not operate to repeal the exception in favor of Bloomfield, much less will they so operate where the two provisions are in the same law, for it would be a curious construction to hold that one part of an act repeals another part of the same act.

We conclude, therefore, that the 14th section was not intended to abrogate the exception in favor of Bloomfield, or to any part of that township; nor was it designed to enlarge the scope of the act beyond its effect under the previous sections, but was only intended to apply to changes to be made in the constitution or boundaries of townships previously made liable to the act, and as a necessary consequence Montclair was not thereby made liable to be bonded in aid of the railroad company.

B. But it is further claimed that such a liability was created and imposed upon the new township by the act by which it was incorporated.

This contention rests upon a clause contained in the third section of the act setting off the township of Montclair, which is as follows:

"And all acts and parts of acts in force in the said township of Bloomfield, at the time of the passage of this act, are hereby intended to and shall be in force in the said township of Montclair; *but the provisions of any act or acts from the operation of which the township of Bloomfield has by any proviso or exception therein contained been specially excepted, shall apply to and be in force in said township of Montclair from and after the time this act shall go into effect, the same as if the township of Bloomfield had not been specially excepted therein.*" (Record, page 99.)

To this contention we reply that if this act can be construed as a repealer of the exception in favor of Bloomfield above referred to, so far as Montclair is con-

cerned, and therefore as attempting to render Montclair liable to the provisions of the bonding act, it fails of the purpose, because it is in contravention of that provision of the constitution of New Jersey, Art. IV., § VII., Par. 4, which is as follows:

"To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but *one object, and that shall be expressed in the title.*"

Our contention is that the obscurely worded repealer contained in the 3d section of the Township Act, is void, because—

1st. It has "no proper relation" to the subject matter of the act, to wit, the setting off a part of Bloomfield into a new township.

2d. It was not a "necessary or proper part" of such object.

3d. It was not expressed in the title.

This constitutional provision has on several occasions been applied and enforced by the highest Courts of New Jersey.

In *Rader* vs. *The Township of Union*, decided by the Court of Errors in 1877, 39 N. J. L., (10 Vroom,) 509, the statute under consideration was entitled "An act in relation to streets in Union township, in Union county."

The first section sets off and incorporates a road district, for the purpose of laying out, opening and improving streets, roads, highways *and public parks*, within the limits thereof. While subsequent sections provided for the building of sewers.

BEASLEY, *C. J.*: "The making and control of streets is entirely different from the making of parks; the two have no connection, and neither is an adjunct to the other, and it is impossible, as it seems to me, to logically hold that a description of one embraces both. The rule

that there must be *a substantial unity* in the statutable object, as indicated by the title, is, in this instance, obviously violated. . . . . .

"It has already been said, that the purpose of the provision requiring the object of the proposed law to be expressed in its title, is *to give notice of and publicity to the proposed legislation*, and such purpose would be thoroughly frustrated, if a rule should be sanctioned having a scope sufficiently wide to embrace and to validate the present act.

"The title of this act is, 'An act in relation to *streets*, in Union township, in Union county,' and it will, on a moment's thought, be perceived how general such an allusion to the legislative purpose is.

"It is true, that it may be difficult to indicate, by a formula, how specialized the title of a statute must be; but it is not difficult to conclude that *it must mean something in the way of being a notice of what is doing.* Unless it does this, it can answer no useful end.

"It is not enough that it *embraces* the legislative purpose—IT MUST EXPRESS IT; and where the language is too general, it will accomplish the former, but not the latter."

The act contemplates "an important change, most materially affecting the property and personal rights of the inhabitants of the district embraced in the law; and yet it is certain the title of this statute would not have conveyed to such persons any intelligible intimation of the project in contemplation."

So in the Court of Chancery of New Jersey, in *Penna. R. R. Co.* vs. *National Railway Co.*, 23 N. J. Eq., (8 C. E. Green,) 457, Vice Chancellor Dodd declares that the things intended to be secured by this clause of the constitution are, "to prevent men from obtaining from the legislature the passage of acts without disclosing their real meaning and purpose; to protect the legislature from being misled by doubtful or ambiguous language; to permit nothing to be acquired from the public by

covert and cunningly devised phrases; to compel those who ask for special privileges to say frankly and unmistakably what they mean, so that plain men cannot fail to understand what it is they are asked to vote away."

See also the same case on page 458.

In *Boyd* vs. *State*, 94 U. S., 645.

A statute of Alabama was entitled "An act to establish a Mutual Aid Association, and to raise funds for the common school system of Alabama." It authorized a lottery, and the corporators, who, under color of this act, set on foot a lottery, were indicted on an old statute of Alabama prohibiting lotteries.

This Court sustained the decision of the State Court, which denied the constitutionality of the act in question, and Mr. J. FIELD in delivering the opinion of the Court, quotes with approbation, the following:

"But granting that the right to set up and carry on a lottery is conferred in the body of the statute, *it is not expressed in the title.* Never was language employed less apt to convey to the mind, learned or unlearned, the idea that the partnership association, the Mutual Aid Society, was to be an undisguised lottery, and that the encouragement of letters, the promotion of science, and the arts which it proposed, was the uncertain prize in currency which might fall to the ticket holder," "and (adds Mr. J. FIELD) because the object is not thus expressed, the act was declared to be unconstitutional. We cannot refuse to give effect to that decision. It is the province of the Supreme Court of the State to construe its own constitution and laws," and when it decides that one of its own laws is not authorized by its constitution, it is not for us to deny the correctness of the decision."

See also,

People vs. *Hills*, 35 N. Y., 449.
People vs. *O'Brien*, 38 N. Y., 193.
People vs. *Allen*, 42 N. Y., 420.
Huber vs. *The People*, 49 N. Y., 132.

Devlin vs. *Mayor, &c. of N. Y.*, 48 How. Pr., 457.
Walker vs. *State*, 49 Ala., 329.

All of which have a special bearing on the question now being considered.

Sedgwick on Stat. and Const. Law, 567.
Cooley's Const. Lim., 81–83, 141–150.

Applying these doctrines to the case in hand, what do we have?

First, the title of the township act.

"An act to set off from the township of Bloomfield in the county of Essex, a new township to be called the township of Montclair."

This was another way of saying it was an act to divide the township of Bloomfield. It was the stereotyped form by which the legislature had always, from the earliest times, entitled acts by which a new township was created entirely out of an old one.

Yet under such a title, the promoters of this township act sought to confer on the corporation the power, and subject it to the liability of becoming a stockholder in a private corporation to the extent of twenty per cent. of the taxable real estate of the township, and that too by the use of covert and obscure language, which would require a person desirous of learning its meaning, to search through all the legislation of the State in regard to Bloomfield township.

What legislator would have supposed that under a title so simple, and so common, there would be found a power so extraordinary? What citizen of Bloomfield, knowing that by the bonding act his property could not be taxed for this railroad, would have had the slightest notice or intimation from such a title, that there lurked in the act a provision by which he might be required in effect to mortgage his land to twenty per cent. of the value, in aid of its construction?

Such an object was no part of the creation of a township, "had no proper relation" to such a purpose, and

has been repeatedly held to be so foreign and extraneous to the ordinary power and liabilities of a township as to require special legislation of the clearest and most unequivocal character to justify it.

In ~~Mayh~~ Mayor &c vs. *Ray*, 19 Wall, 468, the law was stated by Mr. J. BRADLEY in these words :

"Such power (*i. e.* to borrow money) does not belong to a municipal corporation as an incident of its creation."

The same doctrine was held in New Jersey in *Swackhamer* vs. *Hackettstown*, 37 N. J. L., (8 Vroom,) 191.

This title was not "*a head under which*" the creation of a large public debt for the benefit of a private corporation "*might reasonably be looked for.*" (27 Ind., 223.)

It "*misled*" the public as well as the legislature, (8 N. Y., 241 ;)—it was a studied "*concealment of a mischievous purpose,*" (13 Abbott's Pr. Rep. N. S. 121 ;)—it averted "*suspicion or inquiry as to the real subject,*" (35 N. Y., 449 ;)—it did not "*give notice of and publicity to the proposed legislation,*" (39 N. J. L. 509 ;) and, hence, it was "*a fraud upon the public ; a fraud upon the constitution.*" (53 Barb., 70.)

To adopt the language of our New Jersey Courts, the two subjects of the Montclair act are "*distinct and unconnected matters,*" (33 N. J. L., 350 ;) they "have *no connection*, and neither is *an adjunct to the other*, and it is impossible * * * * to logically hold that a *description of one embraces both.*" (39 N. J. L., 509.)

"It is not enough," said Chief Justice BEASLEY in the last cited case, that the title "embraces the legislative purpose ;—IT MUST EXPRESS IT."

No such provision was ever contained in any other of the acts by which the three hundred townships, boroughs and cities of the State of New Jersey, have been created. Whenever such legislation as this has been attempted, it has always been by a special act.

We contend, therefore, that that part of the third section of the act creating Montclair township, which seeks to make it liable to the provisions of the bonding act, is unconstitutional and void.

C. There is still another act on which the defendant in error relies to legalize these bonds. It was passed on the 27th of March, 1874, as a supplement to the bonding act, and is found on page 105 of the Record. It is as follows:

"1. *Be it enacted by the Senate and General Assembly of the State of New Jersey,* That hereafter the township committees for the time being of the township of Montclair, in the county of Essex; the township of Kearney, in the county of Hudson; and the township of Pompton, in the county of Passaic, respectively, shall be the commissioners provided for in the first section of the act to which this is a supplement, and shall discharge all the duties, and be subject to all the liabilities of such commissioners under said act."

"2. *And be it enacted,* That so much of said act as is inconsistent herewith, is hereby repealed, and this act shall take effect immediately."

This statute was referred to and its effect somewhat considered in the case of *Pompton* vs. *Cooper Union*, 101 U. S., p. 202; which was a case arising under this same bonding act, and in speaking of it Mr. J. SWAYNE said:

"In cases like this, legislative ratification is the equivalent of original authority, and what is clearly implied in a statute is as effectual as what is expressed. 1 *Dillon, Mun. Corp.*, Sec. 46; *United States* vs. *Babbitt*, 1 Black, 55. *Whether this statute was a ratification of the sale of the bonds as made, if such ratification were needed, is a point which the view as taken of this case renders it unnecessary to consider.* It was certainly a clear recognition of Pompton as one of the townships authorized to issue bonds in aid of the railroad company—a legislative construction entitled to great respect."

From this citation it is plain that this Court did not either consider the question or decide whether the act of 1874 was or not a ratification of the action of the company who had issued bonds for Pompton township, and is, therefore, no authority on that question.

The effect of this act may be considered in two aspects:

1. As a legislative construction of the act.

2. As a ratification of the previous action had in the name of Montclair township.

(1.) Viewed as a question of construction, it is elementary law that the legislature had no power to determine what the true construction of its previous enactment had been.

This precise question has been recently dealt with by this Court in the case of *Koskkonong* vs. *Burton*, 104 U. S., 678; and Mr. J. HARLAN, in delivering the opinion of the Court, said:

"In this country where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, *or to change the rule of construction as to a pre-existing law.* Courts will treat such laws with all the respect that is due to them, as the expression of the opinion of the individual members of the legislature, as to what the rule of law previously was. But beyond that they can have no binding effect; *and if the Judge is satisfied the legislative construction is wrong, he is bound to disregard it.*"

So on page 679.

"The contract between the town and the holders of its securities was entered into prior to those enactments, *and the rights of the parties must necessarily be determined by the law as it was when the contract was made.*"

So in the present case the action of the so-called commissioners of Montclair township, the issuing of the

bonds and the purchase by plaintiff below, were all before the enactment of this law, and as a rule of construction it can have no bearing on the question under discussion.

The above decision renders unnecessary the citation of any other authorities on this topic.

(2.) Was this act directly or by necessary implication a ratification of the previous action of the commissioners of Montclair township?

~~There~~ is of course a question of legislative intent to be drawn from the act itself. We respectfully contend that it can have no such effect.

It needs no argument to show that this act contains no direct or express ratification of the bonds in question. It is entirely prospective in its operation, and only relates to duties *hereafter* to be performed. It makes no mention of the bonds, nor does it refer in the remotest way to anything theretofore done by persons acting for these townships. There is nothing in the act to suggest that the legislature knew that any bonds had been issued. It does not manifest the least intention to abrogate or dispense with the jurisdictional provisions of the bonding act, but simply provides for future action under said act, leaving all questions to arise as to the past to be settled by the law as it then stood.

It does not mention, nor allude to, the then *acting commissioners*, or their *acts;* nor *legislate them out of office;* nor provide for the *surrender of their trust*, or the settlement of their accounts.

It does not speak of the *debt*, or the *bonds*, or the *interest* thereon.

It does not validate the *former proceedings;* nor waive any *irregularities* therein.

It does not recognize the existence of the *power*, under which the commissioners had claimed to act.

Nor does it manifest any knowledge of the fact that

commissioners had ever been appointed, or assumed to act for their townships.

Hence, this Act of 1874 was no express *ratification* of what had been done by the commissioners, in the name of the township. As a rule, curative statutes should be *express* in their terms.

Satterlee vs. *Matthewson*, 2 Pet., 380.
Wilkinson vs. *Leland*, Ib., 627.
Bissell vs. *Jeffersonville*, 24 How., 287.
Gelpcke vs. *Dubuque*, 1 Wall., 175.
Thompson vs. *Lee County*, 3 Wall., 387.
St. Joseph vs. *Regis*, 16 Wall., 644.
Roberts vs. *Bolles*, 101 U. S., 119.
National Bank vs. *Co. of Yankton*, Ib., 120.

But is there a ratification by "*implication?*"

We say that there is not, because such implication must be *clear.*

We assent to the doctrine laid down in *Township of Pompton* vs. *Cooper Union*, 101 U. S., 201—to wit: that "What is CLEARLY implied in a statute is as effectual as what is expressed. 1 Dillon on *Munic. Corp.*, sec. 46; *U. S.* vs. *Babbit*, 1 Black, 6."

The books show that such implication must always be free from doubt. And we refer to some of the cases decided in the same Court, including the one cited in *Pompton* vs. *Cooper Union*, (sup.)

U. S. vs. *Babbit*, 1 Black, 55. The language of the statute was express: "*No register*, or *receiver*, shall receive for his services, during any year, a greater compensation than the maximum *now allowed by law.*" The Court held that it included all officers of the classes named.

Edwards' Lessee vs. *Darby*, 12 Whea., 210. The words of the later act were: "Shall cause to be surveyed, where such surveys *have not already been made.*" And the Court said: "This provision must be construed as

recognizing the validity of and as ratifying the surveys which had been made by the commissioners under the act of 1782."

Gelpcke vs. *Dubuque*, 1 Wall., 220. "In this act it is clearly implied that cities have authority to subscribe for railroad stock, and to issue their bonds in payment of it."

The statute fixed the rate of interest on the bonds and allowed them to be sold by the railroad companies at prices below their par value, and expressly declared that its provisions should "apply to any railroad bonds *which have been heretofore issued*, as well as to those which may hereafter be issued."

And it happened that the bonds in controversy had been issued *after* the passage of the explanatory act.

Campbell vs. *City of Kenosha*, 5 Wall., 194. The later act provided for the appointment of a railroad commissioner, who "shall receive all funds *paid* into the hands of the city treasurer, on account of the tax for the benefit of the Kenosha and Beloit R. R. Co., and shall hereafter redeem all scrip *which has been issued* to said railroad company, as the same becomes due."

DAVIS, *J.*: "This is not in terms a curative act, but it has that effect by fair implication. . . If by a direct act, equally in any other way; *if the intention of the legislature to legalize clearly appears.*" . . It was "a full legislative recognition of the legality of the subscription, and the issue of the scrip. . . . The words of the law are imperative. The commissioners shall redeem the scrip; surely the legislature would not commend this to be done, unless it intended to recognize the validity of the scrip. 'To redeem all scrip *which has been issued* to said railroad company, as the same becomes due,'—the very words of the law,—can mean nothing else than that such scrip had received legislative sanction, and, in the opinion of the lawmakers, ought to be paid."

Beloit vs. *Morgan*, 7 Wall., 619. The language of the second act was: "All bonds *which have been heretofore issued*," etc.

We also refer to the case of the *Kent Coast Railway Co.* vs. *London, &c., Railway Co.*, 3 Law Rep., Ch. App., 656. An act of parliament had authorized the leasing, upon certain conditions of a certain line of railway to another company. The conditions had not been performed; and only the heads of an agreement for a lease had been drawn. Subsequent acts contained various references to the matter; but there was no direct expression of an intention to validate the proceeding.

Sir WILLIAM PAGE WOOD: "We think that if the legislature had intended to give validity to an arrangement which was, in our judgment, altogether invalid, at least up to 1864,—it would have done in so in plain and distinct words."

The *clear implication* above referred to must be a necessary implication—such as is required to make a subsequent statute repeal a former one, when there is no express repealer.

Mr. Justice SWAYNE defined such an implication in *McCook* vs. *Smith*, 1 Black, 470, when he says:

"A repeal by implication is not favored—the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts together."

So in this case the act will not be considered as a ratification of the bonds already issued, if it be possible for it to have effect without.

There was nothing in the bonding act to limit the time within which proceedings under it must be begun.

It was competent for such proceedings to be commenced at or after the passage of this act of 1874. It therefore had no necessary operation on the past; but from its whole scope and limit was future and prospective in its terms and operation.

The most that can be *implied* from it is that the legislature considered that Montclair was or might be subject to the original act, and we have before shown the only effect to be given to such an expression of the legistative opinion.

Maxwell on the *Interpretation of Statutes*, 287: "An act of parliament *does not alter the law* by merely betraying an erroneous opinion of it. For instance, the 7 Jac. 1, c. 12, which enacts that shop books shall not be evidence above a year before action, did not make them evidence within the year, though the enactment was obviously passed under the impression, not improbably confirmed by the practice of the courts in those days, that they were admissible in evidence. *Pitman* vs. *Maddox*, 2 Salk., 690."

Wilberforce on *Statute Law*, 13: "An erroneous declaration of existing law is wholly inoperative. Speaking of an act which was apparently based upon an erroneous view of the law of partnership, the Privy Council said: 'The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shown to be different from what the legislature supposed it to be, the implication arising from the statute, cannot operate as a negative of its existence.' *Mollwo* vs. *Court of Wards*, L. R., 4 P. C., 437; *Earl of Shrewsbury* vs. *Scott*, 6 C. B., N. S., 141; Ex parte *Lloyd*, 1 Sim. N. S., 250; *Metcalfe* vs. *Hanson*, L. R., 1 H. L., 250."

Dore vs. *Gray*, 2. T. R., 358: An erroneous recital that sewers, etc., of a certain class were not under the survey of the Commissioners of Sewers, nor of the statute of 23 Henry VIII., did not take away the jurisdiction which that act had given to the commissioners.

Postmaster General vs. *Early*, 12 Whea., 148. An act of Congress gave jurisdiction of a certain kind unto the District Courts, concurrently with the Circuit Courts, it being based upon the error that such jurisdiction already existed in the Circuit Courts.

The Supreme Court said: "A mistaken opinion of the legislature concerning the law does not make the law. But if this mistake is manifested in words competent to make the law *in future*, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though *inoperative on the past*, may *act in the future*."

The application is obvious—the legislature may have supposed that Montclair was included within the terms of the Bonding Act of 1868; but, if they were mistaken in such belief, the Supplement of 1874 will not aid the unlawful issue of bonds in 1870.

We think no case can be found where an act apparently so destitute of all intention to ratify past illegal transactions has been held to have that effect.

If there be, in the act of 1874, an implied grant of power, it is *a new power* and does not relate to nor validate the former proceedings.

We, therefore, respectfully insist that none of the acts of the legislature relied on as authority for the issuing of these bonds are sufficient to authorize it.

It is a significant circumstance in this connection that the recital in the bonds referring to the authority under which they were issued makes no mention of the Township act or any other authority than the original Bonding act. (Record, page 3 and page 2.)

II

The next point to which the attention of the Court is directed, and in which we insist there is manifest error, is presented by the following assignments of error, viz. :

Sixth. There is also error in this, to wit, for that the said Judge at said trial refused to permit the defendants to show and give in evidence that the persons whose names were appended to the consents signed by the owners of real estate in the said township, which were put in evidence by the plaintiff in this cause, did not represent two-thirds in value of the taxable real estate of the township of Montclair, and overruled the offer of the defendants to prove said fact.

Seventh. That there is also error in this, to wit, for that the said Judge at said trial refused to permit the defendants to show that the written consent of persons owning, or representing as agent or president, at least two thirds of the real estate and landed property in the township of Montclair, borne on the last assessment roll at the value therein appearing, had not been obtained before the issuing of the bonds, and overruled the offer of defendants' counsel to prove said fact.

Eighth. There is also error in this, to wit, for that the said Judge at said trial refused to permit the defendants to show that the written consent of persons owning, or representing as agent or president, at least two-thirds of the real estate and landed property of the township of Montclair, borne on the assessment roll for the township of Bloomfield, for the year eighteen hundred and sixty-seven, was not obtained before the issuing of the bonds, and overruled the offer of the defendants to show that fact.

Ninth. There is also error in this, to wit, for that the said Judge at said trial refused to permit the defendants to show and give in evidence that there was a deficiency in such consent mentioned in the last assignment of errors, relating to the Bloomfield assessment roll,

amounting to ninety-six thousand six hundred and twenty dollars, ($96,620), and overruled the offer of the defendants to show and give in evidence that fact.

Tenth. There is also error in this, to wit, for that the said Judge at said trial refused to permit the defendants to show that the statutory requirements preliminary to the issuing of the bonds were not complied with, and overruled the offer of the defendants to prove said fact.

Eleventh. There is also error in this, to wit, for that the said Judge at the said trial overruled the offers of evidence of the defendants referred to in the tenth (10th), ninth (9th), eighth (8th), seventh (7th), and sixth (6th) assignments of errors, upon the ground that at that stage of the proceedings the defendants were estopped by the acts of their officers from raising the defense sought to be sustained by the said offers of evidence.

Twelfth. There is also error in this, to wit, for that the said Judge at the said trial refused to permit the defendants to prove and give in evidence that before the issuing of said bonds, no assessment roll was made by extracting from any assessment roll or rolls for eighteen hundred and sixty-seven, or eighteen hundred and sixty-nine, all that relates to any assessment of persons or property in the territory embraced in the new township of Montclair, and overruled the offer of the defendants to prove the said fact.

Thirteenth. There is also error in this, to wit, for that on the said trial the said Judge refused to permit the defendants to show that the signers of consents, which had been put in evidence by the plaintiff in this case, did not represent two-thirds of the taxable real estate and landed property of the township of Montclair borne on the assessment roll of eighteen hundred and sixty-nine, (1869) by a deficiency of over seventeen thousand dollars, ($17,000), and overruled the offer of the defendants to prove that fact.

Fourteenth. There is also error in this, to wit, for that on said trial the said Judge refused to permit the defendants to show and give in evidence that the assessor of the township of Montclair, Arzy E. Van Giesen, did not, in ascertaining the facts which he certified to, to enable the said bonds to be issued, pursue the course pointed out by the statute, and overruled the offer of the defendants to prove said fact.

Fifteenth. There is also error in this, to wit, for that on the said trial the said Judge refused to permit the witness, Arzy E. Van Giesen, to answer the following question put to him by the counsel of the defendants at the said trial, namely, "Did you extract from any assessment roll of the township of Montclair, or the township of Bloomfield, the valuation of taxable real estate in the township of Montclair, for the purpose of making this affidavit?"

Sixteenth. There is also error in this, to wit, for that the said Judge at the said trial refused to permit the defendants to prove by the witness, Arzy E. Van Giesen, that he made the affidavit as assessor in this case, without having extracted from any assessment roll the taxable value of the real estate, to enable him to determine whether the signers of the said consents represented two-thirds of the taxable real estate in the township of Montclair or not.

Seventeenth. There is also error in this, to wit, for that the said Judge on the said trial refused to permit the defendants to prove that no extract was made by the said Arzy E. Van Giesen, from any assessment roll of the taxable value of the real estate, for the purpose of making the affidavit made by him to the said consents.

Eighteenth. There is also error in this, to wit, for that said Judge at the said trial refused to permit an answer to be given by the witness, Arzy E. Van Giesen, to the question which was put to him by defendants' counsel as follows, namely, "Did you give to the commissioners,

of showing that he was a purchaser for value, or claims title through such a purchaser, was on the plaintiff.

Thirty-ninth. There is error also in this, to wit, for that the said Judge at said trial charged the jury that if they were satisfied that Messrs. Hening, Harrison and Littell were in fact appointed by the Judge, and if they were satisfied that the bonds were registered by the parties for the commissioners, or by agents of theirs, before they became the property or under the control of the railway company, that their verdict should be for the plaintiff in the sum of twenty thousand six hundred and eighty-one dollars and twenty-one cents, ($20,681.21.)

The offers of evidence and rulings of the Court thereon, and the exceptions thereon allowed, so far as relates to the testimony offered and excluded, are found in the printed record on pages 182 to 189 inclusive; also on pages 192, 193.

The charge of the Judge commences on page 208, and the requests to charge, and the refusals, and the exceptions to the Judge's charge, occur on pages 220 to 224 of the record inclusive.

Reference to these pages of the record will show that on the trial the Judge ruled out a large amount of testimony offered to show fraud and illegality in the issuing of these bonds, on the ground that because plaintiff was a *bona fide* purchaser of the bonds the defendants were estopped from proving such frauds and illegality, unless they would undertake to bring a knowledge of such fraud or illegality to the plaintiff before he became a purchaser of the bonds. (Record, pp. 189, 190, 217, 218.)

A like examination of the record will also show that the Judge, in charging the jury, practically instructed them to disregard all such evidence as was in the case, unless knowledge of the frauds or irregularities was brought home to the plaintiff, because the Court assumed that the plaintiff was a *bona fide* holder. He also refused to charge as requested in the tenth request, that "if the

evidence satisfies the jury that there were circumstances of fraud or illegality in the inception of the bonds, or in the circumstances under which they were issued and disposed of by the commissioners, then the plaintiff cannot recover on the bonds without some proof that he purchased them for value, or gave some consideration for them."

His reasons for such ruling are found on pages 220 and 221 of the record, and it there appears that his attention had been called to the rule laid down by this Court in the case of *Smith* vs. *Sac County*, 11 Wallace, 139, and that he disregarded the doctrine of that case, on what he understood to be the superior authority of three prior cases decided in this Court, viz.: *Goodman* vs. *Simonds*, 20 How., 343; *Swift* vs. *Tyson*, 16 Peters, 1; and *Lardner* vs. *Murray*, 2 Wallace, 118.

In this ruling we claimed on the trial, and insist here, that the Judge was in error; that he tried the cause on an erroneous theory, and that defendants below were thereby denied the admission of much important evidence, and were deprived of the due and legal effect of such evidence as was admitted. The fact that the question involved in this ruling has been recently dealt with by this Court, and definitely settled in accordance with the contention of plaintiffs in error, renders unnecessary the citation of the many authorities in support of such contention, or any attempt to reconcile the case of *Smith* vs. *Sac County* with the cases relied on by the Judge.

We refer, of course, to the recent case of *Stewart* vs. *Lansing*, 104 U. S., 505.

In that case the Chief Justice thus declares the law on page 509 of the report:

"It is an elementary rule that if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper under such circumstances is not enough, (citing) *Smith* vs. *Sac*

County, 11 Wall., 139. Here the illegality of the paper was established. It was incumbent, therefore, on the plaintiff, to show that he occupied the position of a *bona fide* holder before he could recover."

Such a rule would be of little value if the maker of the paper is to be deprived of the opportunity to show such fraud or illegality, unless he first shows a negative, that plaintiff is not a holder for value, or else charges him with notice of the fraud.

This case differs from the case of *Stewart* vs. *Lansing*, and also from the case of Dana, just argued, in this: in *Stewart* vs. *Lansing*, there was a feeble attempt to prove the *bona fides* of plaintiff's ownership, and although there was some evidence on that subject, this Court held it to be so imperfect and insufficient, that it sanctioned the action of the Court below in taking the question from the jury and directing a verdict for defendant.

So in the Dana case, Mr. Dana did appear at the trial and attempt by his own evidence, and that of others, to prove the *bona fides* of his ownership.

But nothing of the kind was attempted in the present case; not a witness was called or a particle of evidence given to prove that Ramsdell ever bought the bonds or paid a dollar for them. Mr. Ramsdell did not show himself at the trial, nor did it appear from any evidence in the cause, that such a man ever existed. For all that was shown on the trial or appears on this record, Mr. Ramsdell may be as purely a fictitious plaintiff as John Doe or Richard Roe.

This failure of proof is the more significant because the plaintiff, (as was the case in *Smith* vs. *Sac County*), in his declaration, alleges with much show of particularity, that he was a *bona fide* holder for value, and thus assumed the affirmative of that issue, while on the trial he did not even prove that they came to his hands before maturity, which is one of the very essentials of *bona fide* holding.

The case of *Stewart* vs. *Lansing*, and *Smith* vs. *Sac County*, are so entirely in point, and so concluding on the question involved in this point, that the error of the Court below is so manifest as to render any further discussion of the point unnecessary.

The Judge took all such questions from the jury. He submitted to them only two questions:

1. Was an order ever signed by Judge Depue appointing Hening, Harrison and Littell commissioners for the township?

2. Whether the registry of the bonds was a part of the transaction of the exchange, and was done by the commissioners, or the committee, or by persons representing them. * * * *

"If, on the other hand, you are satisfied that they were registered by the parties for the commissioners, or by agents of theirs, then, gentlemen, your verdict will be in favor of plaintiff for the sum of $20,651.21."

(Record, page 217.)

In the case of *Smith* vs. *Sac County*, above cited from 11 Wallace, Mr. Justice MILLER, speaking for this Court, adopted the rule as laid down by POLLOCK, *C. B.*, in *Hall* vs. *Featherstone*, 3 H & N., 284, viz.:

"*If there are any circumstances in the nature of fraud or illegality* which can be left to the jury, proof of these circumstances will cast on the plaintiff the *onus* of showing that he gave value for the bill."

And Mr. J. CLIFFORD, in his dissenting opinion, on page 159, re-states the rule as follows:

"But the defendant is not permitted to put the plaintiff to proof of the consideration he gave for the instrument, *unless the defendant can prove that the instrument was obtained from the defendant, or some intermediate party*, by undue means, as by fraud or force, or that it was lost or stolen, *or that it was originally infected with illegality.*"

Mr. Justice CLIFFORD'S dissent was not based on any doubt as to the above rule, but on the ground that the

findings of the Court below did not bring the case within the operation of the rule.

The question then comes, did the proof which was offered and rejected, taken in connection with facts actually proved in the case, show or tend to show any circumstances in the nature of fraud or illegality which could be left to the jury?

The law expressly prohibited the issue of the bonds "until the written consent of persons owning, or representing as agent or president, at least two-thirds of the real estate and landed property of said township, town or city, borne on the last assessment roll thereof, at the valuation thereon appearing, shall have been obtained." (Record, 101–2.) And the 14th section, before cited, provides in case of a new or enlarged township, "*The said commissioners shall cause to be prepared* an assessment roll for the purposes of this act, by extracting from any assessment roll or rolls of persons or property in the territory in the said township," &c., &c. (Record, 105.) Of course without such consent the issue of the bonds was totally illegal.

Now the defendants below were prepared and offered to show that this prerequisite was totally disregarded.

That the consents filed did not contain the required two-thirds—that no attempt was made to prepare an assessment roll, as required by the 14th section, and that, in fact, the consent of the two-thirds was never obtained.

That, on these grounds, the inhabitants of the township caused a suit in equity to be instituted, and obtained an injunction to prevent the issue of the bonds, and that the defendants, the railroad company and the commissioners, answered falsely, setting up a *bona fide* issue of the bonds before the injunction was obtained.

That Crane, the former assessor, refused to make the affidavit necessary to justify the issue of the bonds.

That Van Giesen, his successor, knowing of such refusal, made his affidavit on the day on which he was sworn into office, without making the least inquiry or attempting to satisfy himself of the truth of the fact sworn to, and that his affidavit was untrue. That the commissioners knew of Crane's refusal.

That the commissioners acted on a certificate of the assessor made on the 16th day of March, 1870.

That Van Giesen was not sworn into office until March 17th.

That the bonds were actually issued in violation of an injunction forbidding their issue.

In addition to the above evidence, which was overruled, the following were actually proved:

The commissioners and the railroad company knew an injunction had been applied for, and they left the State to avoid its service. (Pratt, p. 151.)

(Jared E. Harrison, p. 164; do. page 165.)

(Littell, 176.)

They went through the form of a fictitious sale for a worthless check of $200,000, which was never deposited or used, but was a device to evade the law.

(Pratt, 151; do. 147, 149. Harrison, pp. 166, 199.)

The bonds were stamped to bear date a day before they were actually issued.

(Harrison, p. 167; Littell, p. 171.)

At least two of the commissioners refrained from going to their homes on the night of the 17th, to avoid the injunction.

(Harrison, p. 165.)

That Commissioner Harrison's affidavit, as to the signatures on the consents, was false.

(Harrison, pp. 159, 160.)

That the commissioners in fact exchanged the bonds for worthless, unsecured income bonds, on which the township never realized a dollar.

(Record, 175; do. 180.)

That the ostensible issue of the bonds on the 18th of March was fictitious, a collateral arrangement having been made with the railroad company and Fuller, its contractor, that the bonds were not to be used until long afterwards, and which time was after the service of the injunction.

(Record, pages 162–3, 166, 171; do. 152.)

These facts, with such as were overruled, were abundant to put plaintiff on proof of the *bona fides* of his ownership, and to have required the jury to pass upon that question.

They certainly were "circumstances in the nature of fraud or illegality," which could and should have been left to the jury.

The general rule which has governed cases of this character, has been that when the agents of the township by recitals on the face of the bonds, assert that the bonds have been issued in pursuance of law, a *bona fide buyer* need not look behind such recital to inquire into the existence of the facts prerequisite to a compliance with the law, and that as to *such a buyer* the township is estopped from showing the truth to be different from the recital. But no such estoppel exists in favor of a man who is not a *bona fide* purchaser. To such the doctrine has no application. It follows, therefore, that when, as in this case, the law casts upon the plaintiff the burden of proving the *bona fides* of his purchase, and he utterly fails to show either that he paid value for them, or that he bought them before maturity, or even that he ever bought them at all, the township was wrongfully deprived of the privilege of showing the truth in regard to the illegality of the bonds, and the fraud attending their issue.

There is no hardship or inequity in applying such a rule to the present case, because it is fair to presume that if Ramsdell ever bought these bonds he did so with full notice of the decisions of the Supreme Court and Court of Chancery of New Jersey, both of which had, before

his purchase, decided that bonds of this character were subject to such proof as was offered and overruled in this case.

The only bonding act ever passed by the legislature of New Jersey, besides the one now under consideration, was one passed the same day, (April 9, 1868,) entitled "An act to authorize certain towns in the counties of Somerset, Morris, Essex, and Union to issue bonds and take stock in the Passaic Valley and Peapack Railroad Company." (N. J. Session Laws of 1869, p. 915.)

An inspection of this act will show that its second section, which (as in the present law) describes the conditions on which the bonds are to be issued, is precisely similar to the second section of the present act, so far as it relates to the questions involved in this case.

Yet in 1869 the Court of Chancery of New Jersey, in *Lane* vs. *Schomp*, 20 N. J. Eq., page 82, held that the affidavit of the assessor was not conclusive proof of the facts stated therein, and allowed an injunction against issuing the bonds, based on proof that the assessor's oath was untrue.

The Chancellor in that case, on page 88 of the report, says: "The defendants contend that the affidavit of the assessor is in the nature of an adjudication, and estops the complainant from enquiring into its truth. IT IS IN NO SENSE AN ADJUDICATION BUT SIMPLY EVIDENCE; it is made so by the statute, which OMITS TO MAKE IT CONCLUSIVE even as evidence.

"The provisions of a statute, to make them conclusive, should be very explicit and clear. Like the acknowledgment and proof of deeds, and the proof of wills, which by statute are made evidence, by much the same words they are *prima facie* evidence, and may be rebutted by any lawful proof. . . . . .

"The defendants admit that they intend to issue these bonds. . . . They have no authority to do this; and the complainants are entitled to an injunction to restrain them.

"These commissioners are not a municipal corporation, exercising legislative functions or discretionary powers, but they are ministerial officers, on whom power is conferred by a special statute, to be exercised only upon certain conditions."

The same Passaic Valley and Peapack act (P. L., 1868, p. 915,) also came before the Supreme Court of New Jersey, in June term, 1873. (*Morrison* vs. *Bernards*, 36 N. J. L., 219.)

BEASLEY, *C. J.*: "When the provisions of a statute have been infringed or disregarded by public officers, and such provisions are publicly known, the statute must have effect, and no estoppel from such official misconduct can be interposed. This is the doctrine laid down with marked emphasis by Lord DENMAN, in *Regina* vs. *White*, (4 Ad. & L., N. S., 101,) and such doctrine can never be more applicable than in the present case.

"The statute in question is a public act; the commissioners are the *special* and not the general agents of the corporate body, and their capacity to issue these bonds is made dependent on the vote of a specified body of persons.

"In general, those dealing with a *special* agent must inform themselves, at their peril, of the extent of the authority of such agent, and the present is, certainly, not an occasion in which the rigor of this principle should be in any degree relaxed.

"*The act directs that the evidence of the existence of the authority of the commissioners shall be put upon the public files, so that the fact whether the bonds have a legitimate existence, can be easily and certainly ascertained.*

"If a purchaser takes them without inquiry, and they turn out to be illegal, because a prerequisite has been omitted, the embarrassment of his position is attributable to his own carelessness; and if a loss is to be incurred, it is more just that it should fall upon him rather than upon the public who is in no default. Under such circumstances, the corporate body cannot be

estopped, by the acts or declarations of their agents, from impeaching instruments put in circulation, without authority, by such agents.

"I think all the English, and most of the American authorities, can be put on this footing; although it must be admitted that some few of the latter appear to have been decided without adverting to the distinction that exists between the efficacy of acts done by the *special* agents, and those done by the *general* agents of a corporation; and between the operation of an agency, the extent of which depends on facts known only to the corporate body and its servants, and that of an agency *whose scope is marked out by circumstances which are publicly known.*

"In the present case, the plaintiff is chargeable with knowledge of the fact that the commissioners had no lawful authority to put these bonds in the market, unless by force of a vote of the requisite number of land owners, and with knowledge as to the existence or non-existence of such consent."

Whatever may have been the law elsewhere these decisions were the settled law of New Jersey in regard to obligations of this character before Ramsdell bought his bonds. They have never since been overruled or ever questioned in New Jersey.

In *Douglass* vs. *County of Pike*, 101 U. S., p. 687, Ch. J. WAITE says:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself." * * *

"So far as the case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

If, then, a purchaser even for value, with the law thus declared, chooses to speculate in obligations of that char-

acter, relying upon a certificate thus held to be open to inquiry and contrary proof, to use the language of Ch. J. BEASLEY above quoted, the "embarrassment of his position is attributable to his own carelessness; and if a loss is to be incurred, it is more just that it should fall upon him rather than on the public who is in no default."

A man who fails to show that he is a purchaser at all, certainly cannot complain that the truth is given in evidence against him.

III.

The next error on which plaintiffs in error rely, is assigned as follows:

Thirty-eighth. There is also error in this, to wit, for that the said Judge at said trial refused to charge the jury as requested by defendants' counsel, that the commissioners had no authority to delegate any duty imposed on them by the act, to others, nor to confer on any other person the right to determine when or to whom the bonds should be delivered or disposed of.

The request to charge on this point, the refusal of the Jadge, and the exception allowed thereon, are found on page 221 of the record.

The facts in the record which suggested such a request, are as follows:

The danger of an injunction preventing the issue of these, bonds as has been before shown, induced the commissioners at the request of the buyers, (the railroad company,) to go to New York and make an apparent sale, so that they would appear to have been *bona fide* sold before the injunction should issue.

The obstacle in the way of such action was the fact that the commissioners in obtaining the consents of land owners to the scheme, had been obliged to promise them that the railroad company should not have the bonds any faster than they had laid out money on the road in Montclair, or between Montclair and New York.

This difficulty, and how it was obviated, are graphically described by Mr. Jared E. Harrison, one of the commissioners, on page 162, as follows:

"*Q.* To whom were they disposed of?

"*A.* Well, that sale has been showed by Mr. Pratt, here; that is, there was a gentleman presented himself there, and it would perhaps be as well for you, if you will permit me to do it, to state why there was an arrangement between the railroad company and the commissioners; the commissioners, I for one, and the other commissioners, had promised the people of Montclair that gave their signatures, that the railroad company should not have the bonds any faster than they laid out the money on the road in Montclair, or between Montclair and New York; now to make a *bona fide* sale, we must forfeit our word, and there had to be to avoid that; you understand me?

"*Q.* Yes, sir; I understand you.

"*A.* And I made a proposition to the railroad company to do what we would do and nothing else; and that was that there must be three men clothed with the same authority that we had to control these bonds, and then we would make a *bona fide* sale of the bonds; but our transaction must be *bona fide;* you understand?

"*Q.* I understand.

"*A.* Then this gentleman came in, and after some conversation agreed to purchase the bonds of the township at par.

"*Q.* Won't you tell us who that gentleman was?

"*A.* I could not tell you; I never knew; I did not know what his name was.

"*Q.* Yes.

"*A.* And he paid for them, or offered to pay with a check.

"*Q.* Yes.

"*A.* The check not being certified, I turned around and asked Mr. Pratt, as president of the road, whether he would accept of that at par in payment of the bonds of the railroad company, and he replied that he would; I recollect the circumstances distinctly.

"*Q.* Well?

"*A.* Consequently the agreement between the railroad company and the commissioners for the control of those bonds, being placed in the hands of the parties that I named, and that the commissioners agreed to, was carried out, and Mr. Cortlandt Parker drew up the agreement.

"*Q.* Yes.

"*A.* Then the sale was effected and the bonds signed and sold.

"*Q.* Yes; then what was done?

"*A.* Mr. Hening took the income bonds, and whether the railroad company, or who took the town bonds, I could not say.

"*Q.* But they were disposed of, were they not?

"*A.* The exchange was made; the transaction between the commissioners and the purchaser of the bonds was a *bona fide* transaction; we had no authority with them, only the party that was confided in was known by the commissioners.

"*Q.* Who were the parties that were confided in?

"*A.* Samuel Holmes, Theron Doremus and Daniel V. Harrison.

"*Q.* The parties who got the bonds did not, at the time they bought them, get complete control of them?

"*A.* No, sir; they were deposited, and were under the control of the parties that I named; they had the same control of them that the commissioners would have had if they had not made the sale.

"*Q.* And those parties were security on the commissioners' bonds, were they not?

"*A.* I think they were.

"*Q.* Then the arrangement of the sale was that after the bonds were sold they still remained under the control of those persons who were named by the commissioners?

"*A.* Yes, sir.

"*Q.* And were not to be disposed of without their order?

"*A.* Yes, sir."

The same statement is substantially repeated in the evidence of Mr. Pratt, the president of the railroad company, on pages 152 and 153:

"*Q.* How soon after this arrangement with Farley did the railroad company become the owners of the bonds?

"*A.* I cannot say how soon that was.

"*Q.* About as near as you can tell?

"*A.* They did not become in all respects the owners of the bonds until after they had done work on the railroad, in respect to the town, equal to the amount of the bonds.

"*Q.* How was that arrangement manifested?

"*A.* By an agreement to place the bonds in trust in the hands of a certain trust company, subject to the call or order of certain citizens, who were agreed upon in the respective towns, and they were satisfied that a certain amount of work had been done in those townships, and then the bonds were to be used.

"*Q.* When was that agreement made in reference to the sale to Farley; before or after?

"*A.* That was made prior to the issue of the bonds, or the sale of the bonds by the commissioners.

"*Q.* Who were the parties to that agreement?

"*A.* I think Mr. Fuller, the contractor, who was to have the use of the bonds of the Montclair Railroad Company, on one side, and those other citizens, by the approval of the commissioners, on the other.

"*Q.* And it was to carry out that arrangement that the transaction was had with Farley?

"*A.* I don't remember that, sir; I do not think that Farley knew anything about that.

"*Q.* What did Farley do with the bonds?

"*A.* My recollection is he sold them to Mr. Fuller.

"*Q.* What did Mr. Fuller do with them?

"*A.* Fuller placed them in the Trust Company to be drawn out, as I have stated.

"*Q.* According to the arrangement you have stated?

"*A.* Yes sir.

"*Q.* Was that arrangement in writing?

"*A.* Yes, sir.

"*Q.* And was that agreement made prior to the sale of the bonds?

"*A.* Prior or at the same time; at the same interview.

"*Q.* And were the bonds in fact deposited with the trust company?

"*A.* Yes, sir.

"*Q.* What trust company?

"*A.* The United States Trust Company.

"*Q.* And who were the citizens upon whose orders they were to be drawn?

"*A.* D. V. Harrison, Montclair; Samuel Holmes and Mr. Doremus.

"*Q.* What is his first name, Theron S. Doremus?

"*A.* Yes, sir."

"*Q.* Were they not the sureties on the commissioners' bonds?

"*A.* I think they were; yes, sir."

The written agreement above referred to is copied in the record at page 205, and the time and manner of the actual issue of the bonds to the railroad company by the trust company, are shown by the Exhibits 2 to 9, on pages 201 to 204 of the record.

From this it is apparent that the commissioners, after having made a fictitious and fraudulent sale, which was in fact no sale, abdicated all their duties connected with the actual issue and disposition of the bonds, and delegated the performance of such duties to the three trustees named in the agreement, D. V. Harrison, Samuel Holmes, and T. S. Doremus.

It will also be seen that in no case did these three trustees all act in the delivery of the bonds, but in every case they were issued on the order or endorsement of only two of them.

This delegation of authority, we claim, was entirely unauthorized and illegal.

The powers conferred by this act upon these commissioners were very great. They were agents of the township, and this Court has repeatedly held that the mere certificate of such agents that they had complied with the law, was enough to estop the township from questioning its truth as against a *bona fide* buyer.

The method of their appointment, as directed by the act, was such as to secure the services of men specially qualified for such duties, and no trace can be found in the act of any intention to authorize them to delegate their powers or substitute any other person to perform their duties. The act vested in these commissioners, and in them alone, the discretion to determine the terms on which the bonds were to be issued, and the familiar rule that a mere private agent cannot delegate his powers, in the absence of power so to do expressly conferred or necessarily implied, is especially applicable to statutory agents of a municipal body.

Dillon Mun. Corp., §§ 60, 567, 618, and notes.

In *State* vs. *City of Paterson*, 34 N. J., (5 Vroom) 163, it was decided that when judgment and discretion are required of municipal officers, they cannot be delegated without express legislative authority.

To the same effect are *State* vs. *Trenton*, 36 N. J., 198; *State* vs. *New Brunswick*, 32 N. J., 548; *Lyon* vs. *Jerome*, 26 Wendell, 485; *New York* vs. *City of New York*, 3 Duer, 119.

See opinion of COMSTOCK, *J.*, in *Davis* vs. *Mayor, &c., of New York*, 14 N. Y., 532.

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SUPREME COURT, U.S.
FILED
JAN 4 1893

17-197

Supreme Court of the United States.

No. 147.

THE INHABITANTS OF THE TOWNSHIP OF MONTCLAIR, IN THE COUNTY OF ESSEX,

Plaintiffs in Error,

vs.

THOMAS RAMSDELL,

Defendant in Error.

Argument for Defendant in Error.

JOHN F. DILLON,
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CHARTER OF MONTCLAIR RAILWAY COMPANY.

Act of March 18th, 1867 (Laws of New Jersey, 1867, page 303), entitled "*An Act to incorporate the* MONTCLAIR RAILWAY COMPANY" (reprinted more fully in the printed record, p. 96).

Route. "SEC. 6. That the president and directors of the said company be, and they are hereby, authorized and invested with all the rights and powers necessary and expedient to survey, lay out, and *construct a railroad from the Village of Montclair, in the Township of Bloomfield, in the County of Essex, to the Hudson River*, at the Pavonia Ferry or at the Hoboken Ferry, or between the said ferries, and may construct a branch thereof in said township, and may extend the said railway into the townships of Caldwell and Wayne."

Issuing Bonds. "SEC. 18. Said company shall have power, and it is hereby authorized, to make its bonds, and, for the purpose of securing their payment, to mortgage its real estate and personal property."

BONDING ACT OF APRIL 9, 1868.

Act of April 9th, 1868, entitled "*An Act to authorize certain townships, towns and cities to issue bonds, and to take the bonds of the Montclair Railway Company.*" (Reprinted more fully in printed Record, page 101).

"SEC. 1. That on the application in writing of twelve or more freeholders, residents of any township, town or city along the routes of the Montclair Railway Company, or at the terminus thereof (*except the township of Bloomfield*, in the County of Essex, *which township is hereby excepted from the operations of all the provisions of this act*), it shall be the duty of the JUDGE OF THE CIRCUIT COURT of the county

wherein such freeholders shall reside, within ten days after receiving such application, TO APPOINT *under his hand and seal not more than three freeholders, residents of such township, town or city, to be* COMMISSIONERS THEREOF, *to carry into effect the purposes and provisions of this act;* said commissioners shall hold their offices respectively for the term of five years, and until others shall have been appointed.

"SEC. 2. That it shall be lawful for said COMMISSIONERS TO BORROW, on the faith and credit of their respective townships, towns, or cities, *such sums of money, not exceeding twenty per centum of the valuation of the real estate and landed property of such township*, town or city, to be ascertained by the assessment rolls thereof, respectively, for the year 1867, for a term not exceeding twenty five years, at a rate of interest not exceeding seven per centum per annum, payable semi-annually, AND TO EXECUTE BONDS THEREFOR, *under their hands and seals respectively.* The bonds so to be executed may be in such sums, and payable at such times and places, as the said commissioners, and their successors, may deem expedient; but *no such debt shall be contracted*, or bonds issued by said commissioners of, or for either of said townships, towns or cities, *until the written consent of the persons owning or representing as agent or president at least* TWO-THIRDS *of the real estate and landed property of such township*, town or city, borne on the last assessment roll thereof, at the valuation thereon appearing, shall have been obtained.

"SUCH CONSENT SHALL STATE the amount of money authorized to be raised in such township, town or city, and that the same is to be invested in the bonds of said railway company, and the *signatures shall be proved by one or more of said commissioners.* The fact that the persons signing such consent *own or represent, as aforesaid, at least two-thirds* of the taxable real and landed property of such township, town or city shall *be proved by the affidavit of the Assessor of such township*, town or city, endorsed or annexed to such written consent, and the Assessor of such township, town or city is hereby required to perform such service.

"*Such consent and affidavit* SHALL BE FILED in the office of the Clerk of the County in which such township, town or city is situated, and a certified copy thereof in the office of the Clerk of such town-

ship, town or city, and the same, or a certified copy thereof, shall be evidence of the facts therein contained, and shall be received as evidence in any Court of this State, and before any Judge or Justice thereof."

SEC. 8. The 8th section requires the Commissioners to give their OFFICIAL BONDS, with security to be approved of by the Judge.

SEC. 13. "That the commissioners in each of said townships, towns or cities *shall constitute a board to act for their said townships*, towns or cities respectively, and a majority of said commissioners in each of said boards shall constitute a quorum to do any business authorized by this act."

SEC. 14. "That in case any NEW TOWNSHIP, *town or city shall have been created*, or the boundaries of any township, town or city shall have been enlarged on the routes of the said railway, or at the termini thereof, so that there is no assessment roll for the year 1867 for such township, town or city so created or enlarged, the said commissioners for such new or enlarged township, town or city, shall cause to be prepared an assessment roll for the purposes of this act, by extracting from any assessment roll or rolls for said year all that relates to any assessment of persons or property in the territory embraced in the said new township, town or city so enlarged or created, or in said enlargement."

SEC. 15. "That this act shall be a public act, and shall take EFFECT *immediately*."

Approved April 9, 1868.

ACT OF APRIL 15, 1868, INCORPORATING MONTCLAIR TOWNSHIP.

Act of April 15th, 1868, entitled "An Act to set off from the Township of Bloomfield, in the County of Essex, a new township to be called the Township of Montclair," (Laws of 1868, page 999; reprinted more fully in Printed Record, page 99).

"SEC. 1. That all that portion of the township of Bloomfield, known as the second election district of said township, and lying west of a line running through said township as follows: Beginning at a point [here describing its boundaries]

shall be, and hereby is set off from the township of Bloomfield, in the County of Essex, *and made a separate township, to be known by the name of the township of Montclair.*

"SEC. 2. That the inhabitants of the township of Montclair shall be, and they are hereby constituted, a *body politic and corporate* in law by the name of 'The Inhabitants of the Township of Montclair in the County of Essex,' *and shall be entitled to all the rights, powers, privileges and advantages*, and shall be subject to all the regulations, government and liabilities *to which the inhabitants of the other townships* in said County of Essex are or may be entitled or subject by the laws of this State.

'SEC. 3. That the inhabitants of the said township of Montclair shall hold their first town meeting at the lecture-room of the Presbyterian Church, in the said township of Montclair, on the third Tuesday in April, 1868, and that thereafter their annual town meeting shall be held on the second Monday in March of each and every year; that at their town meetings they shall vote by ballot until it be otherwise determined according to law, and that all the provisions and restrictions of an act entitled 'An Act to authorize the inhabitants of the several townships of this State to vote by ballot at their town meetings,' approved March 22d, 1860, and of the supplements thereto, shall apply to the inhabitants of the said township of Montclair, and all acts and parts of acts in force in the said township of Bloomfield at the time of the passage of this act are hereby extended to and shall be in force in the said township of Montclair, *but the provision of any act or acts from the operation of which the township of Bloomfield has by any proviso or exception contained therein been specially excepted shall apply to and be in force in said township of Montclair from and after the time this act shall go into effect the same as if the township of Bloomfield had not been specially excepted therein.*"

Approved April 15, 1868.

SUPPLEMENTARY ACT OF MARCH 24, 1874.

A supplement to an act entitled "An Act to authorize certain Townships, Towns and Cities to issue Bonds and to take the Bonds of the Montclair Railway Company."

1. That hereafter the township committees for

the time being of the Township of Montclair, in the County of Essex, the Township of Kearney, in the County of Hudson, and the Township of Pompton, in the County of Passaic, respectively, shall be the commissioners provided for in the first section of the act to which this is a supplement, and shall discharge all the duties and be subject to all the liabilities of such commissioners under said act.

2. And be it enacted, that so much of said act as is inconsistent herewith is hereby repealed, and this act shall take effect immediately.

Approved March 24, 1874.

(Printed in full in Record at page 105).

CONSTITUTIONAL PROVISION.

Article IV, section 7, relating to Titles to Acts.

"To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

COPY OF ONE OF THE BONDS AND COUPONS IN SUIT.

(Printed Record, p. 181.)

UNITED STATES OF AMERICA.

(Engraving.)

STATE OF NEW JERSEY, ESSEX COUNTY, TOWNSHIP OF MONTCLAIR.

No. 109] [$1,000

IN PURSUANCE OF AN ACT *of the Legislature of the State of New Jersey, approved April 9th, 1868, entitled An Act to authorize certain townships, towns, and cities to issue bonds, and to take the bonds of the Montclair Railway Company:*

Know all men by these presents that the inhabitants of the Township of Montclair, in the County of Essex and State of New Jersey, hereby, for value received, acknowledge themselves indebted to Samuel Holmes, or bearer, in the sum of one thousand dollars in lawful currency of the United States of America, which sum of money the said corporation promises to pay on the first day of November, 1883, at the National State Bank of Newark, with interest thereon at the rate of seven per cent. per annum, payable on the first day of May and Novem-

ber in each and every year, on presentation and surrender of the annexed coupons as the severally become due, at the said National State Bank of Newark. Interest on this bond to cease at its maturity.

(Aross the face in red ink:) $1,000.

(On left margin :) $1,000. REGISTERED in the County Clerk's Office. H. T. DUSENBURY, Clerk of Essex County.

(On right margin:) $1,000.

In witness whereof, the Commissioners for the Township of Montclair, appointed in pursuance of the provisisions of said Act, have hereunto set their hands and seal respectively, to be hereunto affixed, this 17th day of March, 1870.

R. M. HENING, [L. S.]
JARED E. HARRISON, [L. S.]
H. B. LITTELL, [L. S.]

Commissioners for the Township of Montclair.

COUPON. [$35.

The Township of Montclair, in the County of Essex and State of New Jersey, will pay the holder thereof, on the 1st day of Nov., 1883, thirty-five dollars, on presentation at the National State Bank of Newark, being semi-annual interest on bond.
No. 109.]

R. M. HENING,
Chairman of the Commissioners.

MONTCLAIR TOWNSHIP,
Plaintiff in error,

VS.

THOMAS RAMSDELL,
Defendant in error.

Argument for the Defendant in Error.

Statement of Case.

Action of debt brought July 8th, 1876, upon various bonds and coupons.

The bonds and coupons are negotiable in form. (See copy *ante*, p. 6, and in printed Record at page 181.)

The pleadings are correctly summarized in the brief of the plaintiff in error (pp. 1, 2).

THE DECLARATION (Record, pp. 1-94) counts upon these bonds and coupons. Each count alleges that the plaintiff purchased for value, of a previous purchaser for value. There is also added (p. 94) a common count.

THE ONLY DEFENSE PLEADED to the counts on the bonds and coupons is *non est factum;* to the common count, for interest, *nil debet.* (Record, p. 94.)

It will hereafter be shown that the plea of *non est factum* put in issue only whether the bonds and coupons in suit were lawfully sealed by the commissioners so as to be the deed of the township, by force of the legislation of New Jersey; and that it admitted all the other allegations of the declaration, including those relating to the plaintiff's title and his *bona fides.*

The cause was tried before Judge NIXON, and a jury. Verdict and judgment for the plaintiff. Defendant below prosecutes this writ of error to

reverse the judgment, and assigns forty errors upon the record. (Record, pp. 225–230.)

These errors relate to the admission and rejection of evidence, to the charge of the Court to the jury, and to certain refusals to charge as requested by the defendant.

These errors will be grouped into classes and discussed in the following

ARGUMENT:

When your Honors shall finally reduce this case to its last analysis, it will be found to lie in a narrow compass and to require for its decision mainly the application of familiar doctrines.

The bonds in suit are negotiable.

There was statutory authority to issue them, provided the statute applies to the defendant township—a subject which will be examined further on. The bonds were issued to aid in the building of the Montclair Railway which runs through the defendant township. The proceeds of the bonds were expended within the township; the consideration for the bonds was received and is still retained by the defendant; the railway was built and is still operated from terminus to terminus; the township bonds were negotiated and sold; the defendant made no complaint for years, and the plaintiff is, as will be hereafter shown, a *bona fide* holder for value without notice, and deriving title, also, from a like holder for value before maturity. The bonds recite on their face that they are issued *in pursuance* of the Act of the Legislature of April 9, 1868, authorizing the bonding of the township.

Under these circumstances there is and can be, according to the settled law of this Court, but one

possible defense to the bonds, and that must be a *want of power* in the defendant township or the officers and agents who acted for it, to issue them.

No *mere irregularities* in the exercise of the power, if the power existed, are available by way of defense.

The assignments of error, so far as insisted on in the printed brief of the plaintiff in error, are reduced to the three following:

1. There was no lawful authority in the defendant township to issue the bonds, *i. e., want of power.*

(Brief of plaintiff in error, Point I, pp. 3 to 30 inclusive.)

2. Errors at the trial in excluding certain testimony offered by the defendant below, and in misdirection to the jury and in refusals to charge, all having respect to alleged *irregularities or illegalities in the exercise of the power,* if it existed.

(Brief of plaintiff in error, Point II, pp. 33 to 46 inclusive.)

3. Error of Court in refusing to charge as requested by defendant that the commissioners had no *authority to delegate any duty* imposed on them by the Bonding Act.

(Brief of plaintiff in error, Point III., pp. 46 to 51 inclusive.)

We will discuss the errors relied on in the foregoing order.

I.

Concerning the Power to Issue the Bonds.

We maintain, THAT THERE WAS VALID LEGISLATIVE AUTHORITY TO ISSUE THE BONDS IN SUIT.

The Court will find this subject, as well as the other questions arising in the case, methodically presented and discussed in the exceedingly clear and connected charge of his Honor in the Court below.

On March 18, 1867, the Legislature CHARTERED THE MONTCLAIR RAILWAY COMPANY to construct a railroad, running through what is now the territorial limits of the defendant township.

Route described in Charter, *ante* p. 2, § 6; Record, p. 97.

The Company was authorized (Sec. 18) "to make its bonds and secure them by mortgage."

Ante, p. 2, Sec. 18; Record, p. 98.

THERE ARE THREE ACTS which directly bear upon the question of legislative power to issue the bonds in suit, viz. :

1. The Act of April 9, 1868, called the Bonding Act.

2. The Act of April 15, 1868, the Act Incorporating the defendant township.

3. The Act of March 27, 1874. Supplemental to the Bonding Act.

These Acts are *in pari materia*, and must be read together in ascertaining the legislative intent as respects the question under discussion, and not treated, as they seem to be by the learned counsel

for the plaintiff in error, as disconnected and unrelated.

To these Acts we shall now refer, in order to ascertain whether we are right in affirming, or the plaintiff in error in denying, that the power to issue the bonds in suit was intended to be given by the Legislature to the defendant township.

On April 9, 1868, by what is called the BONDING ACT (*ante*, p. 2; Record, p. 101, *et seq.*), the Legisture authorized, on certain conditions, "any township, town or city" (Sec. 1), and by a subsequent section (§ 14, *ante* p. 4), "any *new* township" thereafter created, "along the routes of the Montclair Railway Company, *except the town of Bloomfield*," acting through the Commissioners provided for in the Act, "to BORROW MONEY on the faith and credit of the township, town or city * * and to EXECUTE BONDS therefor, under the hands and seals of the Commissioners."

The judgment of Mr. Justice STRONG at the Circuit, in favor of bondholders, on bonds issued by Pompton Township under this Act, was affirmed, in this Court, in Pompton vs. Cooper Union, 101 U. S., 196.

This Bonding Act of April 9, 1868, was by its terms declared to be "a public Act, *to take effect immediately*" (Sec. 15, *ante* p. 4). It, therefore, became a law on April 9, 1868.

Six days after this Act went into effect, viz., on the 15th day of April, 1868, the Legislature *carved out of the said* BLOOMFIELD TOWNSHIP a portion of its territory, and erected it into a new and independent township by the corporate name of "THE INHABITANTS OF THE TOWNSHIP OF MONTCLAIR" (*ante* p. 4; Record, p. 99). The Incorporating Act gave,

in express terms, to this new township, "All the rights and powers of the other townships in the County of Essex" (Sec. 2, *ante* p. 5; Record, p. 99). And by an express provision in the 3d section, this new township was, *ex industria*, and from abundant caution, expressly excepted, as we claim, from the provision in the Bonding Act which excepted Bloomfield Township from the operation of that act (*ante* p. 5, Sec. 3; Record, p. 99).

Under this legislation the bonds in suit were issued by the Commissioners of the Township in March, 1870 (form of bond, *ante* p. 6; printed Record, p. 181).

On March 27, 1874, the Legislature passed an act supplemental to the Bonding Act (printed at large, *ante*, p. 5), which assumes and declares the Bonding Act to be applicable to Montclair Township. The true construction and effect of this act will be adverted to hereafter.

No constitutional objection is made in this Court to the Bonding Act.

But it was urged at the trial and is renewed in the argument here that the Bonding Act has no application to the defendant township.

The Legislative intent in the Bonding Act is plain enough on the face of the enactment; it is unmistakable when read in connection with the Act of April 15, 1868, and March 27, 1874.

By the first section of the Bonding Act "*any* township, town or city along the routes of the Montclair Railway Company, or at the termini, except the township of Bloomfield (which township is hereby excepted from the operation of all of the provisions of this act)" may bond itself under the act.

Section 14 makes provisions for *new* townships.
(See *ante*, p. 4, where Sec. 14 is printed in full).

Montclair is a *new* township, and falls within the provisions of Section 14.

The learned counsel for the plaintiff in error, in his printed argument, seems to suppose that the 14th Section cannot apply to the new township of Montclair, unless that Section has the effect to repeal other provisions in the Act, and has cited many cases to show that general statutes are not usually considered to repeal by implication, prior special statutes, unless they are so inconsistent that both cannot stand. The principle has no application to this case. The 14th Section is not in conflict with the rest of the Act. The new township of Montclair may bond itself, as it did, without at all making the township of Bloomfield, in its corporate capacity, or otherwise, in any manner subject to *any* of the provisions of the Bonding Act. The plaintiff is not suing Bloomfield township, or seeking, in any way, to make it, or any property therein, liable.

Note that the 14th section applies to the case of "*any* new township that shall have been created on the routes of said railway, or at the termini thereof," which means, as Judge NIXON held, any township that shall have been created at any time before the powers granted by the act are exercised.
Record, p. 211, fols. 381, 382.

It will be noticed, also, the provision in the 14th section as to *new* townships is co-extensive with the *entire* route of the railway; and hence the suggestion of the learned counsel in his Argument (p. 7) that "the 14th section undoubtedly had reference

to the township of Little Falls," would seem to be without force.

The Bonding Act, in authorizing townships to issue their bonds, in excepting Bloomfield township, and in making provision for new townships, deals with them in their corporate capacity as townships, and not with the real estate within their limits in the sense of annexing privileges or exempting from liability the real property within prescribed territorial limits as these existed at the date of the passage of the Bonding Act.

This is well presented in the charge. (Record, pp. 211, 212.)

It is against known legislative usage in such matters and therefore improbable that the Legislature, compulsorily and against the will of the people to be affected, erected the new township of Montclair. In incorporating the inhabitants of this new township the Legislature prescribed their powers and duties with great care, and unmistakably expressed the legislative intention that they should be subject to the provisions of the Bonding Act.

The Incorporating Act gave this new township "all the rights and powers of the other townships in the County of Essex." (Sec. 2, *ante*, p. 5, Record p. 99).

The 3d Section is explicit and unmistakable as to the legislative will concerning the power of Montclair township to bond itself.

(Re-printed in full, *ante*, p. 5).

It is too plain to be denied that the Legislature intended that the Bonding Act should apply to Montclair township.

The learned counsel not controverting that such was the legislative intention, maintains that this

intention must fail, because this portion of Section 3 of the Act incorporating the defendant township is unconstitutional. To this subject we will now advert.

Constitutionality of 3d Section, Act of April 15, 1868.

It was urged in the Court below, and is urged here, *that the proviso of the third section of the Act of April 15, 1868* (the one incorporating the defendant township), IS UNCONSTITUTIONAL.

On this point the Court charged, as follows (Record, p. 216):

"Something has been said by counsel about the constitutionality of the proviso of the third section of the Act of April 15, 1868. I have not adverted to that, gentlemen, because it is not necessary to decide that question in my view of the law in this case. I have no hesitation in saying, however, that my impressions are that such a proviso is a proper provision, provided the parties wanted it, and that it is *so germane to the subject matter of the creation of townships that the Act cannot be deemed unconstitutional in consequence.*"

It *refused*, under exception, the defendant's request to charge, as follows (Record, p. 218):

"That so much of the Act of April 15, 1868, creating the Township of Montclair, as attempts to impose on that township a liability to be bonded under the provisions of the Act of April 9th, 1868, above referred to, is in conflict with the Constitution of New Jersey, and is therefore void."

"I decline," said the Court, "to charge that, for the reasons already assigned: 1st, That, in my judgment, it is unnecessary to decide that question in this case; and, secondly, that the impressions in my mind are *in favor of the constitutionality of that act rather than against it.*"

The specific objection to the proviso to the third section is that the Constitution declares that "*every*

law shall embrace but one object, and that shall be expressed in the title." (Art 4, sec. 7.)

(Quoted at large *ante*, *p.* 6).

The object of the provision is therein declared to be "to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other."

Why has not the proviso in the third section a proper relation to an act creating the defendant township and defining its powers and duties?

Such a provision was distinctly called for to avoid an ambiguity or doubt which would otherwise have existed, or might be claimed to exist.

The title to the Act is this: "An Act to set off from the township of Bloomfield, in the County of Essex, a new township to be called the township of Montclair."

The decisions in New Jersey and elsewhere show that the objection is not well founded.

State v. Town of Union, 4 Vroom, 350.
State v. Newark, 5 Vroom, 236.

In the case first cited the title of the Act was "An Act to incorporate the Town of Union;" and in the case last cited the title was "A further supplement to the Act entitled 'An Act to revise and amend the charter of the City of Newark,'" and each was held sufficient as against the constitutional objection here insisted on.

Discussing this subject, the Court, in the State v. Newark, *supra*, said:

"It is objected that the act of 1868 is unconstitutional, because in contravention of par. 4 of sec. 7, art. 4 of the constitution of the State, whereby it is ordained, 'that to avoid improper influences which may result from intermixing in one and the same

act, such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.' The *title of the Act* under consideration is '*a further supplement to the Act, entitled 'An Act to revive and amend the charter of the City of Newark,'* approved March 11th, 1857. The first four sections of the act relate to the assessment for the improvement in question, and others similarly circumstanced. The fifth section confers certain power upon the common council, in reference to the laying out and opening certain streets and squares, and the sixth section fixes the time within which the board of assessment of taxes in said city shall deliver the tax lists to the receiver of taxes, and auditor of accounts, and requires the receiver of taxes to deliver to the city treasurer the lists of taxes, after the final returns of the collector of arrears shall have been made in each year. *In my opinion this act has but a single object, which is, to make an amendment or addition to the city charter, whereby certain defects found to exist therein are to be remedied. The object of the act is sufficiently expressed in the title, by calling it a further supplement to the charter.*" * * *

"The dispute arising on the title of this act cannot be distinguished from that adjudicated in the case of the State on the relation of *Walter vs. Town of Union, 4 Vroom, 350.* Justice VAN SYCKLE, delivering the opinion of the court in that case, says: "*The validity of Acts with general titles has been so long recognized by our courts that it cannot now be questioned that under the title 'An act to incorporate the town of Union,' a government for the town could be established, including taxation for its support, courts for the trial of offenders, authority for laying out streets, building sewers and making assessments.*"

See also to same effect:

Jones vs. Columbus, 25 Geo., 610.
Swartwout vs. Mich. Air Line R. R. Co., 24 Mich., 389.
Brandon vs. State, 16 Ind., 197.
People vs. McCullum, 1 Nebraska, 182.
Commonwealth vs. Green, 58 Pa. St., 226.
Mayfield vs. Unger, 8 Iowa, 82.
Whiting vs. Mt. Pleasant, 11 Iowa, 482.
Underwood vs. McDuffie, 15 Mich., 361.
State vs. Newark, 5 Vroom, 236.

Phillips vs. N. Y., 1 Hilton, 483.
City of Rochester vs. Briggs, 50 N. Y., 553.

The two New Jersey cases cited in the brief of the plaintiff in error (pp. 18, 19) are entirely consonant with the foregoing.

But it is immaterial whether the objection is sound or not, since the power to issue the bonds is ample under the Bonding Act (of April 9, 1868), wholly irrespective of this proviso in the Act of April 15, 1868.

The point under discussion is whether the legislature intended that the Bonding Act should apply to *new* townships, which should be created wholly or in part out of Bloomfield township, the same as to new townships elsewhere erected; and as reflecting light on such intention, it is quite immaterial, whether the third section is or is not constitutional.

We maintain that the 14th Section of the Bonding Act in express terms applies to ANY *new* township which may be created before the power conferred is exercised under the Act (Sec. 14, Record, p. 105; *ante*, p. 4).

Judge NIXON'S discussion of this point in his charge is clear and satisfactory.

Record, p. 211, fol. 380 to 383 inclusive.

The learned Judge thus expressed his views to the jury:

"It was said, with a great deal of force by one of the counsel for the defendants, that the fourteenth section of the act of April 9th, 1869, which seemed to contemplate the organization of new townships upon the route of the railway company, only had reference to such townships as should be organized before the act went into effect.

"The difficulty about that construction is that the act went into effect as soon as it was passed. By the express provision of the fifteenth section, there was

no intermediate space of time for the creation of a new township. It must have reference to some other fact.

"After looking through all the provisions of the act, I have come to this conclusion, that the section has reference to the creation of any new township between the time when this act was passed and the time when its provisions were invoked to bond the township, in other words, that the Legislature intended by this fourteenth section to allow the townships along the line of the railway which was organized after it became a law, and before the execution of the powers therein granted, to enjoy the provisions of the act if they chose to avail themselves of it.

"It has, furthermore, been very strongly and ably insisted that the exception of the township of Bloomfield had reference to the territory, and that therefore the Court ought not to infer that in such general phraseology as has been used in the fourteenth section, the Legislature meant to repeal the express exception of the first section.

"Now, as it seems to me, gentlemen, the fallacy of this argument consists in the assumption that the exception had reference to the territory, to the land, to the real estate lying within the limits of the township of Bloomfield as it then existed. If we adopt this construction, then it seems to me that, no matter how much land was added to or subtracted from the township of Bloomfield by subsequent legislation, the land thus annexed or taken away remained in the same condition as to liability of being bonded as it was when the changes were made. I do not think that was the intention of the Legislature. Their intention was to except the corporation, the people of Bloomfield Township, and the persons who owned land there from being subjected to the burden of having their property mortgaged or incumbered by the provisions of this law.

"But if some of the persons then residing within the limits of Bloomfield chose afterward to organize themselves into a new township, and the new township was upon the line or at the termini of said railway, it came within the provisions of the act, and was authorized to avail themselves of its privileges and aid in the construction of the road." (Record pp. 211, 212.)

But if the proviso of the 3d section of the Act of April 15, above discussed, is constitutional, as it

clearly is, the two are to be taken together, and all doubt as to the legislative intent to authorize Montclair Township to bond itself, disappears, and does not seem to be contested in the printed Argument of the plaintiff in error.

The supplemental Act of March 27, 1874 (Record, p. 105; *ante*, p. 5), shows that the Legislature understood Montclair Township to be within the Bonding Act of April 9, 1868, and that lawful commissioners had been appointed.

Being a *supplemental* Act, it is, of course to be construed as part of the legislation upon this precise subject. In Pompton vs. Cooper Union, 101 U. S., 202, speaking of the *same Act* of March 27, 1874, this Court said:

> "In cases like this, legislative ratification is the equivalent of original authority, and what is clearly implied in a statute is as effectual as what is expressed. 1 Dillon, Mun. Corp. Sec. 46; United States vs. Babbit, 1 Black, 55. Whether this statute was a ratification of the sale of the bonds as made, if such ratification were needed, is a point which the view we take of the case renders it unnecessary to consider. It was certainly a clear recognition of Pompton as one of the townships authorized to issue bonds in aid of the railroad company,—A LEGISLATIVE CONSTRUCTION ENTITLED TO GREAT RESPECT.
>
> The bonds of the railroad company held by the Commissioners are still in the hands of the township. It does not appear that there has been any offer to return them."
>
> *Pompton vs. Cooper Union, 101 U. S., at p. 202.*

All this is equally applicable to the present case.

But the Supplemental Act is more than a mere legislative construction of the Bonding Act. It is a validating act and would be effectual to sustain the bonds if the Bonding Act did not of its own force apply to Montclair Township, or if the act incorpor-

ating Montclair Township were unconstitutional on the ground here urged.

When the circumstances are considered as they existed, and were known to exist, at the time the Supplement Act was passed, it seems to us that it is much stronger and clearer *implied ratification and legislative recognition* of the action of the commissioners in issuing the bonds than the Act which was held by this Court to have this effect in

Campbell v. Kenosha, 5 Wall., 194.

How stood the matter on March 27, 1874? Commissioners had been appointed under the Bonding act, and had issued the bonds of the township four years before—had issued the only bonds they ever could issue. They had received in exchange and still retained the bonds of the railway company. The railway had been built, and was being operated. All these facts were of course known to the Legislature. The only thing in 1874 remaining to be done was to provide for the payment, as they fell due, of interest and principal on the township bonds. In this known state of things the Legislature said that "hereafter the township committee of the township of Montclair shall be the commissioners provided for in the first section of the act to which this is a supplement, [the Bonding Act], and *shall discharge all the duties* and be subject to all the liabilities of such commissioners under said act."

What was the legislative intention? It was to provide for the exercise of powers and duties which at *that time* could only relate to bonds already issued, and which powers and duties could only be exercised on the assumption that such bonds were valid.

As Mr. Justice DAVIS said in delivering the judg-

ment of this Court in the similar case of Campbell v. Kenosha, *supra:* "This is not in terms a curative act, but it has that effect by fair implication. * * It is 'a full legislative recognition of the legality' of the bonds issued by Montclair township"

The case distinctly establishes the principle that legislative recognition may validate by *implication* bonds previously issued without authority.

See also City v. Lamson, 9 Wall., 477, 485.
Beloit v. Morgan, 7 Wall., 619.
Gelpcke v. Dubuque, 1 Wall., 175; *Ib.* 220.

But even if the power was *doubtful*, the decisions of this Court are numerous to the effect *that if the municipal authorities have construed their charter, or other legislative acts, as giving the power* to issue bonds, and such bonds have been issued and are in the hands of *bona fide* purchasers for value, THE COURT WILL ADOPT THE CONSTRUCTION PUT UPON THE LEGISLATION BY THE DEFENDANT. This Court proceeds upon the principle that a corporation or public body in a case otherwise doubtful, "having acted upon its own construction and drawn others in to take their securities, will be concluded from denying that construction to be the true one."

Van Hostrup vs. Madison City, 1 Wall., 291.
Meyer vs. City of Muscatine, Id., 391.
James vs. Milwaukee, 16 Wall., 159.
Woodhull vs. Beaver County, 3 Wall., Jr., 274.

Having shown that valid legislative authority to issue the bonds in suit existed, we now come to consider:

II.

Certain alleged irregularities or illegalities in the exercise of the power.

The defendant attempted, on the trial, *to controvert the commissioners' and assessors' affidavits and decisions as to preliminary conditions* to the issue of the bonds having been complied with.

The 6th assignment of error (p. 225), the 7th (p. 226), the 8th, the 9th, the 10th, the 11th, the 12th, the 13th, the 14th, the 15th, the 16th, the 17th, the 18th, the 19th, the 20th, the 21st, the 27th, the 28th and 29th, all rest upon one principle.

By adverting to these assignment of errors it will be seen that *the Court refused to allow the defendant to give parol evidence to show that the consents were not signed by the owners or representatives of* TWO-THIRDS *in value of the real estate of the township.* (Record pp. 182, 183, 185).

The Court also *refused to allow the defendant to give parol evidence that the Assessor* (*Van Giesen*) *made his affidavit as Assessor without having extracted from any assessment roll the taxable value of the real estate to enable him to determine whether the said consents did represent two-thirds of the taxable value of the real estate of the township.* (Record pp. 186, 187).

[Van Giesen was elected Assessor at the regular annual township meeting on March 14, 1870.] (Record pp. 186, 188).

And the Court also *refused to allow the defendant to show that the commissioners acted on the affidavit*

of Van Giesen, as Assessor, before he took his oath of office, unless the defendant proposed to bring home knowledge of that fact to the plaintiff. (Record pp. 192, 196). An oath which, by the way, has no possible relation to his duties under the Bonding Act. Stats. New Jersey, p. 1197.

The provisions in the act of April 9, 1868 (record p. 102; *ante* p. 3), bearing upon the above offers are as follows:

The statute empowered the Commissioners to issue bonds, to the extent authorized, when '*the written consent of persons owning or representing* as agent or president *at least two-thirds* of the real estate and landed property of such township, borne on the last assessment roll thereof at the valuatiou thereon appearing, shall have been obtained. Such consent shall state the amount of money authorized to be raised in such township, town or city, and that the same is to be invested in the bonds of the said railway company, and the *signatures shall be proved by one or more of said commissioners. The fact that the persons signing such consent own or represent as aforesaid, at least two-thirds of the taxable real and landed property of such township, town or city, shall be proved by the affidavit of the assessor of such township, town or city, indorsed thereon or annexed to such written consent;* and the assessor of such township, town or city is hereby required to perform such service. Such consent or affidavit *shall be filed* in the office of the clerk of the county in which such township, town or city is situated, and a certified copy thereof in the office of the clerk of such township, town or city, and the same, or a certified copy thereof, shall be evidence of the facts therein contained, and shall be received as evidence in any court of this State and before any judge or justice thereof."

Section 14 of the Act (Record, p. 105) provided as follows:

"And be it enacted, that in case any *new* township, town or city, shall have been enlarged on the routes of said railway, or at the termini thereof, so

that there is no assessment roll for the year eighteen hundred and sixty-seven, for such township, town or city so created and enlarged, the said Commissioners, for such new or enlarged township, town or city, shall cause to be prepared an assessment roll for the puposes of this Act, by extracting from any assessment roll or rolls for said year, all that relates to any assessment of persons or property in the territory embraced in the said new township, town or city so created, or in said enlargement."

THE CONSENTS are as follows (Record, pp. 127, 128):

"The undersigned, owners of real estate in the township of Montclair, in the County of Essex, and in the State of New Jersey, hereby consent that the said township shall issue its bonds to the amount of two hundred thousand dollars, under the 'Act to authorize certain townships, towns and cities to issue bonds, and to take the bonds of the Montclair Railroad Company,' and that the said bonds of the said township shall be exchanged for and their proceeds invested in the *income* bonds of the said Montclair Railway Company.

"Dated August 20th, 1869.

"JOHN H. HAYDEN,
"And Many Others.

"Signed and acknowledged in the pres-
"ence of the undersigned one of
"the Commissioners named for the
"purpose under said Act.

"R. M. HENING,
"Commissioner."

The names of thirty-three of the signers of the consents were proved by the affidavit of Commissioner Harrison, of fifteen by Commissioner Littell (Record, p. 129), and the rest by that of Commissioner Henning (Record, p, 128).

On each of the consents was the AFFIDAVIT OF THE ASSESSOR (Record, p. 128), as follows;

"STATE OF NEW JERSEY,
County of Essex,
Township of Montclair, } ss.:

"I, ARZY E. VAN GIESEN, Assessor of said township, do hereby depose and say that the owners or

representatives of at least two-thirds of the taxable real and landed property of said township have signed the consent to issue bonds under and by authority of the 'Act to authorize certain townships, towns and cities to issue bonds and to take the bonds of the Montclair Railway Company.'

"ARZY E. VAN GIESEN.

"Sworn before me, this seventeenth day of March, 1870,

"CHAS. B. MORRIS,
"Justice of Peace."

The statute, sec. 2 (Record, p. 102), enacted "*such consent and affidavit shall be* FILED *in the office of the clerk of the County and a certified copy in the office of the clerk of such township*, and the same, or a certified copy thereof, shall be evidence of the facts therein contained and shall be received as evidence in any Court of this State, and before any Judge or Justice thereof."

At the trial the *original consents and affidavits* were produced from the office of the clerk of the County (*Dusenbury*, Record, p. 133) and a *certified copy* of such consents and affidavits from the office of the township clerk of the defendant township (*Pool*, Record, p. 127).

The Court charged as follows (Record, p. 217):

"You will recall the fact, gentlemen, that the defendant offered to show on the trial that two-thirds of the real estate taxpayers of the township of Montclair, as borne on the last assessment roll, had not signed the consents, and also that the assessor whose affidavit was annexed to prove the fact that two-thirds had signed, had not taken the oath of office, as assessor, when he signed the affidavit. These offers were ruled out by the Court, on the ground that if the allegations were true they were not matters which affected a *bona fide* holder of the bonds without notice of these irregularities in the proceedings, and the counsel for the defendants stated that they did not propose to connect the

plaintiff in the suit with a notice or knowledge of these defects."

"The Supreme Court of the United States has ruled that these municipal bonds, have all the qualities of negotiable paper, and that a *bona fide* holder is not to be affected by any irregularities in their issue, however pertinent such proof might be to a holder with notice or knowledge."

This view of the law that a *bona fide* holder of the bonds is not bound to look behind the affidavits of the commissioners and assessor is in accordance with the settled judgments of this Court.

The cases on the point are too numerous to be cited, and it is not necessary to do so.

This principle was applied to bonds issued under the same Act, in Pompton v. Cooper Union, 101 U. S., 196, 203, 204.

The bonds in suit recite that they are issued " in pursuance of the Act of April 9, 1868," giving its title (Record, p. 181).

This act required as a condition a two-thirds consent in writing of the owners and representatives of the real estate of the township. By the Act itself the " signatures to the consent were to be proved by one or more of the commissioners" (Sec. 2, Record, p. 102). It was so done. The fact that they constituted two-thirds was to be "proved by the affidavit of the assessor." It was so done. The consents and affidavit were required to be filed in the office of the Clerk of the County, and a certified copy in the township clerk's office. This was also done. The statute declares that such consents and affidavit so filed " shall be evidence of the facts therein contained."

In many of the cases in this Court the statute had not conferred in *express* terms upon the local officers the power to decide whether the condition precedent

had been complied with, and the Court was left to infer it, or as some of the judgments phrase it, "gather" it from the whole enactment.

The New Jersey Act removes all doubtful elements in the question by expressly investing the Commissioners and the Assessor with the power of deciding whether the preliminary conditions have been met.

The issue of the bonds and the recital that they are issued "*in pursuance of the Act*" make it unnecessary for a *bona fide* purchaser to look further or elsewhere.

The *principle* was decided in the leading case of Knox Co. vs. Aspinwall (21 Howard, 544); but as subsequent cases are more analogous in their facts to the case at bar these will be briefly referred to, in order to recall the established doctrine of this Court and the foundation on which it rests before discussing its application to the case at bar.

In Moran vs. Miami County, 2 Black, 722, 724, the Common Council of a city were, by virtue of various statutes, authorized to subscribe for stock in a railroad company, and to issue bonds in payment therefor on the *petition of* THREE-FOURTHS *of the legal voters of the city.* Before the issue of the bonds, the council decided that three-fourths of the citizens had petitioned, and the bonds themselves thus recited. This Court held that the *council was the tribunal to decide* whether the requisite number had petitioned; that it was contemplated that this question, which was one of fact, should be ascertained and *conclusively settled prior to the issue of the bonds;* and that when sued upon the bonds by an innocent holder for value, PAROL TESTIMONY was inadmissible to show that the petitioners did not

constitute three fourths of the legal voters of the city.

Precisely similar case, Bissell vs. Jeffersonville, 24 Howard, 87.

S. P. Mercer Co. vs. Hacket, 1 Wall., 83, where the defendant attempted to show by extrinsic evidence that the condition precedent (the recommendation of the jury) had not been complied with.

Coloma vs. Eaves, 92 U. S., 484.

Mr. Justice STRONG in one of the cases, above referred to, (Town of Coloma vs. Eaves, 92 U. S., 484), thus expounds the doctrine of the court and illustrates it by reference to cases previously decided. He says:

"Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and issue its municipal bonds in payment, but only on some *precedent condition*, such as a popular vote favoring the subscription, and where it may be *gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been* made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal. In Bissell vs. Jeffersonville, it appeared that the *Common Council* of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the *petition of three-fourths of the legal voters of the city.* The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the Mayor and City Clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the Common Council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value, to recover the amount of

unpaid coupons for interest, it was *held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscribtion.* A similar ruling was made in Van Hostrup vs. Madison City, and in Mercer County vs. Hacket. The same principle has recently been asserted in this Court, after very grave consideration, *and it must be considered as settled.* In St. Joseph Township vs. Rogers, it is stated thus: 'Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner or subject to certain regulations, conditions or qualifications; but if it appears by their recitals that the bonds were issued in conformity with such regulations and pursuant to such conditions and qualifications, *proof that any or all these recitals were incorrect will not constitute a defense for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification, which it is alleged was not fulfilled.*'

In another case (Town of Venice vs. Murdock, 92 U. S., 494) it appeared that legislative authority was given to certain officers of town to borrow money to aid the construction of a railway, and to issue bonds therefor, *provided the* WRITTEN ASSENT OF TWO-THIRDS OF THE RESIDENT TAX-PAYERS *should be previously obtained by said town officers and filed in the County Clerk's Office, with an affidavit of such officers verifying such assent.* A list of assenting tax-payers was filed in the Clerk's Office, and also the required affidavit. Bonds were issued, and were in the hands of a holder, for value. On the trial the question arose whether the plaintiff must prove the signatures to the assent to be genuine, and it was held by the Supreme Court of the United States, denying (Starin vs. Genoa, and Gould vs. Sterling, decided by the New York Court of Appeals) that no such onus rested on him, that the town officers were

created a tribunal to determine whether two-thirds of the resident tax-payers had assented, and that on their decision the purchaser might rely without looking further, and that the town was concluded, in favor of an innocent holder, from denying that the condition precedent had been performed.

What are known as the OVER-ISSUE CASES still more strikingly exemplify the same principle.

Marcy vs. Oswego, 92 U. S., 637.

Mr. Justice STRONG, in the case last cited, speaking for the Court, after stating the facts observed:

"In view of these facts and of the decisions heretofore made by this Court, the question cannot be considered as an open one. We have recently reviewed the subject in the case of The Town of Coloma v. Eaves (*supra*), and reasserted what had been decided before, namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary condition precedent to any subscription or issue of the bonds, *their decision is final in a suit by the bona fide holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive.* And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds had been conditionally granted."

Let us now apply these principles to the assignments of error under consideration. If the plaintiff is *a bona fide* holder for value of the bonds in suit, or if he claims under such a holder, it will not be maintained that *parol testimony* was receivable to show that two-thirds in value had not consented

or that the assessor acted before taking his official office, or failed to make extracts from the assessment roll, &c.

The plaintiff was such a holder. This was admitted on the record, as we shall show hereafter, by the pleadings. It was specially alleged in the declaration, and not put in issue by the plea.

Infra, p. 40 *et seq.*

It was also proved by the testimony as will be hereafter more fully shown in discussing the tenth instruction which was asked by the defendant and refused by the Court.

Infra, p. 41 *et seq.*

Upon the uncontroverted facts, as they appear in this record, if the plaintiff had been the Montclair Railway Company, and the cause had been submitted upon all the evidence offered and rejected, as well as upon that which was admitted, the Court ought peremptorily to have ordered a verdict for the railway company.

There was no illegality or fraud in the issue of the bonds.

The CONSENTS were proved and filed, as the Act required.

So the AFFIDAVIT of the assessor was made and filed. These were the *conditions precedent* to the issue of the bonds, and they were literally and exactly complied with. A double consideration was received by the township, viz.: 1. A corresponding amount of the bonds of the railway company, which Commissioner Littell, testifying as a witness for the defendant, said at the trial he then "had in his pocket," and produced (Record, p. 190). 2. "The road was completed in 1872," says the same witness, "and has been in operation ever since, and still is" (Record, p. 172; see also Record, pp. 167, 176, 179).

The Court will not fail to observe that while the defendant's counsel made numerous offers, with all the variations which professional skill and zeal could conceive, to controvert the truth of the assessor's affidavit that two thirds had consented; to show that the assessment roll had not been prepared; the assessor's official oath taken, &c., he did not offer to show *notice* of these facts to the railroad company.

Record, pp. 182, 183, 185, 186, 187.

In fact the counsel admitted that he could not connect the plaintiff therewith.

Record, pp. 189, 190, 192.

So far from *fraud* being shown, the undisputed facts and circumstances of the case rebutted fraud.

(*Infra*, p. 42 *et seq.*)

It is evident from a careful consideration of what occurred at the trial that the defendant's counsel, as fraud had not been pleaded, made no attempt or offer to prove it. He never suggested fraud in connection with any of the assignment of errors, or attempted to prove any fact from which an inference of fraud, either on the part of the commissioners or the railroad company, could be justifiably drawn. There is, therefore, no basis for the errors assigned on the rejection of the testimony, unless under the pleadings, the question of the plaintiff's *bona fides* was open, and unless further, the plaintiff becomes presumptively, a *mala fide* holder, whenever the defendant offers evidence tending to show that that in point of fact, two-thirds did not consent, or the commissioners or assessors did not prepare an assess-

ment roll, or the assessor take an official oath or the like.

It is denied by us that any of the rejected testimony was of such a character as if received, would raise a presumption that the plaintiff was not a holder for value and thus shift the *onus* on him to rebut such presumption.

Neither in the law merchant nor in the judgments of this Court can there be found authority for such a doctrine.

In Smith vs. Sac Co., referred to more at large hereafter, the county judge went out of his jurisdiction to issue the bonds in pursuance of a collusive and fraudulent agreement with the contractor (Meservy), who gave the judge one of the bonds as a gratuity as soon as it was issued, and the courthouse for which the bonds were given, was never built or attempted or intended to be.

This was *fraud* in the inception of the bonds, and it was rightly held to shift the *onus* to the plaintiff to show that he was a purchaser for value.

The more recent case of Stewart vs. Lansing, 104 U. S., 505, was one of *illegality* in the issue of the bonds. Shortly, the facts were these: On March 21, 1871, the County Judge rendered a judgment appointing commissioners to execute the bonds of the town. On the 27th of March, 1871, a writ of *certiorari* was regularly obtained to review this judgment, which was at once served on the County Judge, who, Sept. 1, 1871, made his return, *of all of which facts both the commissioners and railroad company had full notice.*

On October 14, 1871, the commissioners executed the bonds. On the 27th day of May, 1872, the Supreme Court of New York wholly reversed the

judgment of the County Judge appointing the commissioners and authorizing the issue of the bonds, which judgment still remained in force.

This Court held that "the actual illegality" of the bonds having been thus judicially established, plaintiff was presumptively a *mala fide* holder.

The case at bar does not fall within this principle, because if all the testimony offered had been received, it would not have established the illegality of the bonds, in the sense of the rule, even as against the railroad company. The case at bar, both upon the pleadings and its circumstances, was within the general rule which holds the offered testimony inadmissible. In Bissell vs. Jeffersonville, this Court said:

"When the bonds had been issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the Common Council, and *a fortiori* it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value. We hold that the *company* and its assigns, under the circumstances of this case, had a right to assume that they [the bonds and recorded proceedings] imported verity. For these reasons, *we are of opinion that the parol testimony* [that three-fourths of the legal voters had not signed the petition] was improperly admitted," and the judgment was reversed.

Bissell vs. Jeffersonville, 24 Howard, 287, 292, 299.

Quoted and approved in Moran vs. Miami Co., 2 Black, 715, 725.

"The decision of the Board of Commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but *after* the authority has been executed, and the stock subscribed and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question."

Mercer Co. vs. Hacket, 1 Wall., 93.

The cases including the Royal British Bank vs. Tarquand, 6 Ellis & Bl., 327, so often quoted, show that not only a subsequent purchaser of negotiable paper, but that any person is entitled to the benefit of the estoppel who acts upon the decision that the condition precedent has been complied with.

Whether the Court erred in rejecting the testimony must be judged of by considering the declared purpose for which, and the circumstances under which, it was offered. In other words, the rulings in rejecting the testimony must be decided by themselves and not be mingled and confused with the instructions subsequently asked upon the subject of fraud and illegality, to which we shall next refer.

We premise, however, that if there was no error in rejecting the testimony there is no basis left for the alleged errors of the Court in its charges and refusals to charge on this subject.

The burden of proof as to the plaintiff being a holder for value.

The Court *refused* to give the following charge to the jury, asked by the defendant (Record, p. 219):

"10th. If the evidence satisfies the jury that there were circumstances of fraud or illegality in the inception of the bonds, or in the circumstances under which they were issued and disposed of by the Commissioners, then the plaintiff cannot recover on the bonds without some proof that he purchased them for value, or gave some consideration for them."

Also the following (Record, p. 221):

"11th. That, by the issue presented by the pleadings in the case, the burden of showing that he was a purchaser for value, or claims title through such a purchaser, was on the plaintiff."

There is no color of plausibility for the 11th. The "issue presented by the pleadings" arose upon the plea of *non est factum*, and this, of course, did not throw upon the plaintiff the burden of proving that he was a purchaser for value, or that he claimed title under such a purchaser. This will further appear in the discussion of the 10th instruction asked by the defendant.

The 10th instruction, *supra*, was properly refused, for the following reasons:

1st. The plea of *non est factum*, the only plea pleaded to the bonds and coupons (Record, p. 94), simply put in issue the execution of the bonds by the Commissioners, and their authority in law to execute the same, for and on behalf of the defendant township.

Under this the defendant could show that the bonds in suit were not the deed of the defendant, and possibly that they were void *ab initio*, because issued without the *consents* and *affidavit* having been made, proved and filed as required by the Bonding Act; but not that the bonds were simply voidable.

A plea of fraud is in the nature of a confession and avoidance;—confesses the making, the *factum*, and avoids the instrument because of the fraud practised in obtaining it. It must therefore be specially pleaded.

A contract obtained by fraud is not absolutely void, but voidable only, which means, as the House

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A contract obtained by fraud is not absolutely void, but voidable only, which means, as the House

of Lords expresses it, that it is valid until disaffirmed, and not that it is void until affirmed.

Oakes v. Turquand, L. R. 2 H. L. Cases, 346.*

It is elementary and settled law that the plea of *non est factum* operates only as a denial of the *execution* of the deed, in *point of fact;* that if the deed is made by a public body, executed under statute authority, this plea only puts in issue whether such deed was *executed in the legal form*, so as to be the deed of the defendant by force of the Act; that this plea does *not amount to the general issue*, since it only puts the lawful execution of the deed in issue and ADMITS *the breach and all of the other allegations of the declaration.* The authorities in support of these propositions, which ought not be contested, are subjoined in a foot-note, so as to not break the course of the argument.

When the CONSENTS in this case were proved and filed (as they were) and the required AFFIDAVIT of

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*"The appellant says that he cannot be held to have agreed to become a member, inasmuch as his application for an acceptance of shares was induced by *fraud* and never having done any thing to affirm the contract, he is still entitled to disaffirm it. I cannot agree in that. *The contract was not void, it was only voidable.* What does that mean? I think that point was well put by Mr. *Mellish* in the course of his arguments. He said, that a *contract obtained by fraud is voidable, but not void; does it mean void till ratified, or valid till rescinded?* The latter is the rule where the rights of third parties intervene. That I hold to be clearly the import of the doctrine that a contract induced by fraud is not void but voidable."

Opinion of Lord COLONSAY in Oakes v. Turquand, L. R. 2 Eng. and Irish Appeal cases, 325, 375

Reese &c., Mining Co. vs. Smith L. R., 4 H. L. Cases, 64, S. C., below L. R., 2 Ch. App., 604.

the assessor was made and filed (as it was), the Commissioners had power to issue the bonds, and if this power was *fraudulently* exercised it must be specially pleaded and cannot be given in evidence under the plea of *non est factum*. If, under such circumstances, there was no fraudulent exercise of the power to issue the bonds, a holder thereof is not affected, even to the extent of showing that he gave value. If the power was fraudulently exercised, it must, under such circumstances, be specially pleaded (which was not done), and if the fraud, when thus pleaded, is proved sufficiently to go to the jury, then, and not before, the burden shifts to the plaintiff to show that he, or some one under whom he claims, gave value.

This view disposes of this assignment of error, but there are other answers to it equally conclusive.

Authorities showing that fraud or other matter not going to the *power* of the Commissioners to execute the deed *is not admissible under a plea of* NON EST FACTUM.

"In debt on specialty or covenant, the plea of *non est factum* shall operate as a *denial of the execution of the deed in* POINT OF FACT *only;* and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

3 Chitty's General Practice, 726.
1 Chitty on Pleading, *482 note.
2 Chitty on Pleading, p. 285.

"If a public body be incorporated by a statute, with a special power of executing a deed in a certain form, *non est factum puts in issue whether the deed was executed in the legal form*, and under this plea an alteration in a deed after execution may be given in evidence; but in an action on a bond, a variance, even if material, between the name of the defendant as stated in the declaration and in the bond cannot be taken advantage of under the plea of *non est factum*."

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2d. The 10th instruction was also properly refused because there was *no evidence* of fraud or illegality, admitted or offered, to justify a jury in finding a verdict on this point for the defendant.

The defendant on the trial disclaimed any purpose to bring home to the plaintiff notice of any of the facts relied on as a defense (Record, p. 189, 190). Defendant gave no evidence of fraud, even if such evidence had been admissible under the pleadings. Defendant called the Assessor and the Commissioners as witnesses, and carefully avoided any attempt to prove fraud or collusion, either among themselves, or between them, or either of them, and the officers of the railway company. A verdict for the defendant on the ground of fraud would have been set aside instantly as not justified by the evidence. What fraud existed? Let it be

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"*The following defences* were always required to be *specially pleaded;* matters showing that the deed was merely voidable on account of infancy, or duress, *or fraud.*"
(Same authorities.)

CHITTY in another place, says;

"In debt on specialties and covenants, the plea of *non est factum* shall operate as a denial of the executon of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." 1 Chitt. Pl., *482 note. "All matters in confession and avoidance shall be pleaded specially as above directed in actions on simple contracts." This plea, properly speaking, does not amount to the general issue, it merely denies the execution and effect of the deed as set out.

If that be proved the plaintiff must recover, as the plaintiffs' other allegations and the breach are admitted. This alleged effect of the deed as well as its execution, are put in issue by this plea."
2 Chitty on Pleading, 285.

In covenant there is not and never was, strictly speaking, any

pointed out. Mere "circumstances of fraud or illegality in the inception of the bonds, or in the circumstances under which they were issued and disposed of," is not sufficient, irrespective of the weight and character of these circumstances, to shift the onus to the holder of the negotiable security to show that he purchased for value. "Trifles, light as air," are "circumstances," and under the doctrine, as it is phrased in the instruction, would have the effect to raise a presumption against the holder of commercial paper. The burden only shifts when the facts are such as show or justify a finding of fraud or illegality.

So far from any fraud being shown, the "circumstances" rebut fraud.

See Consents, p. 127.

The Commissioners procured consents extending through a period of months (pp. 127, 159).

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plea of general issue, for the plea of *non est factum* only puts the execution of the deed in issue (14 Johns. 89, 93, and other cases) as in debt on a specialty, (Reg. Gen. Hil. T., 4 Wm. IV.) and not the breach of covenant or any other matter of defense.

The single plea of *non est factum admits all the material averments in the declaration.* 7 Cowen, 474, and other cases cited. The defendant must therefore always have *pleaded specially*, every matter which it would be necessary to plead in debt on a bond or other specialty, as that the deed was voidable by infancy or illegality of the consideration.

Ins. Co. vs. Hodgson, 6 Cranch, 219.

In the case last cited, which was covenant on a policy of insurance, this Court said: "No rule on this subject is more inflexible than that in actions on deeds, *all special matter of defense must be pleaded.*"

Non est factum. * * *On that issue the* only question at the trial is, whether the deed, *as set out in the plea*, was executed by the defendant or not, and the jury are not competent to decide what is

The Commissioners took extraordinary steps to secure the township, and the township received and still retains the consideration—the road was built; the town paid the Commissioners, and for years acquiesced in the transaction.

Record, pp. 158, 159, 162, 164, 165, 166, 167, 168, 169, 171, 172, 173, 174, 176, 179.

Contract to protect township, p. 204.

Pompton vs. Cooper Union, 101 U. S., 199.

The Assessor never received pay from any person (Record, p. 188).

The case of Smith vs. Sac County, 11 Wallace, 139, is relied on to support this request to charge. Let us quote the doctrine as sanctioned by this Court, as it is expressed in that case by Mr. Justice MILLER, to show how essentially it differs from the instruction asked by the defendant:

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the legal effect of the deed. In such case the defendant had better plead *non est factum* without craving oyer, as then the question would be whether the deed *as described in the declaration* was executed by the defendant.

1 Chitty on Pleading, 433.

The precise point was, after full consideration upon the authorities adjudged in the case of Edwards vs. Brown, 1 Tyrwhitt, 182 (Court of Exchequer, 1831), where the action was debt on a bond. The defendant, after craving oyer of the bond and condition, pleaded first *non est factum;* secondly, a plea amounting to a plea of performance of the condition, on which no question arose.

At the trial one of the defendants offered to prove that he was drawn in BY FRAUD *to execute the bond*, but the Judge held that fraud could not be given in evidence on *non est factum*, and the evidence was rejected; and upon the ground of such rejection a rule for a new trial was obtained.

BAILEY, B., in his opinion, says at p. 205: "The first question, therefore, is whether fraud can be given in evidence on *non est factum?* and I am of opinion it cannot. I agree that whatever shows

"It is undoubtedly true" says the learned Justice, "that circumstances may be shown in connection with the origin of such paper, which will devolve upon the holder the burden of showing that he *did* give value for it before maturity. This principle is asserted in the text books of Chitty, Story, Parsons, and others, and is so laid down and sustained by numerous citations of authorities by the learned American annotator of Smith's Leading Cases, p. 752. In one of the latest of the English cases, Hall vs. Featherstone, 3 H. & N., 284 [where there was an affirmative plea of fraud], POLLOCK, C. B., says: 'If there are any circumstances in the nature of fraud or illegality which can be left to the jury, proof of these circumstances will cast on the plaintiff the onus of showing that he gave value for the bill.' To which MARTIN, Baron, added: 'I think there was at the close of the defendant's case evidence for the jury in support of the plea. The authorities have established a principle which is contrary to the general rule, by which a defendant is bound to prove all the facts necessary to constitute a defense.' And BRAMWELL said: 'The cases have established that if there be fraud or illegality in the inception of a bill, or in the circumstances under which it was taken by the person who indorsed it to plaintiff, he must prove consideration.' "

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that the bond never was the defendant's deed, may be given in evidence on the plea of *non est factum;* but if a party actually executes, being competent to execute at the time and was not deceived as to the actual contents of the bond, though he might be misled as to its legal effect and though he might have been entitled to avoid the bond by stating on the record that he was so misled, he is not at liberty, on the plea of *non est factum*, to say that it never became by execution his deed. The rule as laid down in Gilbert's Evidence 162, is this: that the only point in issue, and the controversy on *non est factum*, is whether the deed declared on be the act of the party, so that when the act is proved to be done the whole matter denied by the defendant is proved to the jury; but if there be any other circumstances to destroy that act and avoid its binding force, they must be shown to the Court, that the Court, and not the jury, may judge whether they are sufficient to avoid that deed. We accordingly meet with many instances where that which would avoid a deed and destroy its binding force, both at common law and by statute, has been held inadmissible on *non est factum*, as well as other instances in which it has been specially pleaded. In *Whelpdale's case* (5 Co., 119), the third resolution is: "Where a bond or other writing is by parliament enacted to be void, the party who is bound cannot plead *non est factum*, but in construction of law a deed is to be avoided by the party who is bound by it by pleading special matter, taking advantage of the act of parliament; for, although the act make the bond or other writing void, yet thereto the law does tacitly require orders and manner which obligor ought to follow." In *Colton vs.*

In Stewart vs. Lansing, as above shown, "the actual *illegality*" of the bonds had been judicially established as between the railroad company and the town of Lansing, and it was, therefore, held that it was incumbent on the plaintiff to show that he was a *bona fide* holder.

The point may be further illustrated by a reference to the opinions of two eminent English judges in a leading case.

In Fitch vs. Jones, 32 Eng. L. & E., 134; S. C., 5 Ellis & B., 238, where, in an action on a promissory note, the defendant pleaded that the note was made pursuant to a *wagering contract*, Lord CAMPBELL, C. J., says:

* * * "The question is whether in cases of this kind it lies upon the plaintiff or defendant to give evidence of value. This depends upon whether there is a presumption of law—that there was no consideration which the plaintiff is bound to rebut. *Where fraud or illegality* IS ESTABLISHED there is such a presumption, because, in such cases, the law supposes that the original party, not being able to

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Goodridge (Bla. R., 1108), the defendant was not allowed, on *non est factum*, to refer to the condition of the bond to show that it was in restraint of marriage, and, therefore, void at common law. Harmer vs. Rowe (6 M. & S., 146; 2 Chit. R., 334): "Is not distinguishable from this case. There the bond and condition were set out on oyer, and *non est factum only was pleaded. The defendant was not allowed to prove on that plea that the bond was given to stifle a prosecution for felony, and was, therefore, void at common law, though the fraud was there clear, and the plaintiff had received notice of the defense to be set up.* * * * * * * But the authorities which come closest to this case and press most strongly on my mind are the cases of duress and threats. Every argument which can apply to a case where fraud is the defense, applies equally where threats or duress are so relied on; a party is equally deprived of his free agency and uncontrolled judgment in either case, and yet in cases of duress or threats the authorities are uniform, that they cannot be given in evidence upon *non est factum*, but must be pleaded specially. * * * * * * * * * * * *

Upon these authorities my opinion is, that the plea of *non est factum* in this case did not entitle the defendant to give the evidence he offered, and consequently that such evidence was rightly rejected."

And such it is believed is the law in New Jersey;

In Sayre vs. Sayre, 14 N. J. L. (2 Green), 487 (1834) the action

sue upon the instrument himself, has handed it over to another to sue upon it for his benefit. This presumption, so raised by the law, must be rebutted by the holder, showing affirmatively that he gave value. But when there is a mere absence of consideration, no such presumption arises and therefore there is no occasion for the plaintiff to rebut it." EARLE, J., says: "It is perfectly clear that, as a general rule, all affirmative pleas by way of excuse by a party *prima facie* liable upon a promisory note, must be proved by him, and this is in terms an *affirmative plea.* An exception exists in a class of pleas of considerable importance, where it is alleged against a holder of a negotiable instrument, that it is founded on illegality, and that he took it without consideration. IF THE ILLEGALITY IS PROVED, it raises a presumption that the holder took the instrument without value, and so the burden of proving value is cast upon the plaintiff so far as this, that if no evidence be given on either side, the presumption that he took it without value prevails. It is, therefore, the plaintiff's duty to give evidence of his having paid value." Lord CAMPBELL further says: "My practice where illegality has been *charged and proved*, is to direct the jury to presume the want of consideration *unless it is expressly* proved."

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was of debt upon a bond, and the defendant pleaded *non est factum.*

It was queried whether the defendant under this plea could question the validity of his bond. On a Rule to show cause—

RYERSON, J., at p. 495, says:

"As the objection to the validity of the bond is, in my view, apparent on the record, I prefer leaving it to be decided, when necessary, on a different motion. I think it ought not to embarrass the trial of the fact at the Circuit. At least I am not so clear that the bond is invalid, as to warrant me, under my present impressions, in settling the case on that point against the plaintiff. Besides, I do not perceive how this question can now arise, unless on a motion in arrest of judgment. It is true Chitty, in the 1st vol. on Pleadings, p. 479, says: 'The defendant may give in evidence under the plea of *non est factum*, that the bond was void at common law, *ab initio.*' But I cannot find, on looking into the authorities cited, anything to warrant this question in this state of the pleadings, being agitated on the trial of the issue. * * * * * *

"And if it were manifest on the face of this bond that it was given to stifle a prosecution of felony, and so clearly void at law, after oyer, you might demur, or move in arrest of judgment after verdict. But could the Court, without an open absurdity, tell the jury that they must find that it was not the party's deed when it was manifest he had executed it. That finding would seem to import, at the utmost, that the party never executed it, or had not capacity, or ability, or liberty to act; or, *perhaps*, was deceived as to the act

3. Moreover, "*fraud*" and "*illegality*" are distinct things, and this instruction confused them as if they were one and the same. FRAUD implies want of good faith in the actors in the transaction; ILLEGALITY implies that the transaction was contrary to Act. Imagine this instruction given to the jury in the language in which it was prayed. Who can conjecture what meaning they would attach to it? Who can but conjecture how, under its license, they would sport with the rights of the plaintiff.

What "fraud" was referred to? To what "illegality" in any of the many steps leading to "the inception of the bonds" and their "disposition by the commissioners," would this instruction have conducted the mind of the jury?

This instruction fatally lacked precision. Its danger lay not in its defined and pointed force, but in its deceptive generality.

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which he was doing, and thus touch and impair the validity of the very fact of sealing or delivery; but can never mean that the contents of the deed, or the motives which gave rise to it, are such that the parties ought not to be held to the performance. What would this be but withdrawing the question of law, the construction and validity of a deed from the Court to be settled by the jury?

"My difficulty on this part of the case was intimated on the argument. It is now repeated rather with a view to inquiry and of calling the attention of counsel to it than to its present decision, which is not really necessary."

In English vs. Mayor, &c., of Jersey City, 42 N. J. L. (13 Vroom), 275 (1880), the questions in the case arose on a sealed certificate of indebtedness, executed by the Street Commissioners of Greenville, and it was held that the Commissioners were a *quasi* corporation, and had power to seal the certificate of indebtedness sued on. It was held that *nil debet* was not a good plea. It was also held that "the plea of '*non est factum*' properly tendered the issue whether the specialty was lawfully sealed by the Commissioners, and if so, whether it was the deed of the defendants" by force of the Act of February 4th, 1873, which is the charter of Jersey City.

No court can be required to charge a mere abstract doctrine, or upon a state of facts, of which no evidence sufficient to justify a finding by the jury has been given; and it is error to give, and not error to refuse, such instructions.

Michigan Bank v. Eldred, 9 Wallace, 544.
Chirac v. Reinecker, 2 Pet., 613, page 625.

4. Again the instruction was erroneous, since on the hypothesis stated, it denied the plaintiff's right in any event to recover unless *he* gave value, even though he held under a *bona fide* purchaser for value; which fact stood admitted by the pleadings and was otherwise established.

That is, it appears in the record that the railroad company gave its bonds in exchange for the township bonds, and, also that one Fuller was the contractor for the building of the railway, and was to have the township bonds only as an equal amount was expended within the limits of the township. (See Contract in Record, pp. 205 and 207).

As he made such expenditure the bonds were from time to time delivered to him by the Union Trust Co. (Record, p. 204), on the order of the depositaries thereof in trust for this purpose. These deliveries to Fuller were made at various times from May 9, 1870, to August 4, 1871, (Record, pp. 201–204).

Fuller as well as the railroad company was thus a purchaser for value. The case on this point is precisely like Comm'rs Douglas Co. vs. Bolles, 94 U. S., 104, 109, 110; see also Comm'rs vs. Clark, 94 U. S., 286, Ib. 753.

S. P. Charge of Judge STRONG on the Circuit in Pompton vs Cooper Union; affirmed, 101 U. S. 196, 198, 200.

III.

As to delegation by the Commissioners of their powers under the Bonding Act.

The next and only other error relied on in the brief of the plaintiff in error arises upon the refusal of the Court to give the following charge, asked by the defendant (Record, page 221):

"12th. The Commissioners had no authority to delegate any duty imposed on them by the act to others, nor to confer on any other person the right to determine when or to whom the bonds should be delivered or disposed of."

The Court said: "I decline to charge that. I think the Commissioners not only acted wisely, but I think it is a very proper thing for them to do."

This was excepted to by the defendant and is assigned as error.

The Commissioners, by the Bonding Act (sec. 2), could have sold or exchanged the township bonds for the bonds of the railway company, without making any provision to secure the expenditure of the amount within the township. But in obtaining the consents the Commissioners had promised—*extra* the Act—"that the railroad company should not have the bonds any faster than they laid out the money on the road in Montclair or between Montclair and New York."

Harrison, Record, p. 162.
Littell, Record, p. 171.
Pratt, Record, p. 152.

In making the exchange of township bonds for the bonds of the railway company, the commissioners kept their promise and would not allow the town-

ship bonds to pass into the possession of the railway company or the contractor, Fuller, except upon the written covenant of the company made with the commissioners that the railway company would "expend the whole amount of $200,000 in purchasing land for the said railway and depots within the township of Montclair, and in constructing said railway and depots * * any excess to be forthwith laid out upon that part of the line of said railway on the East—said railway and depots to be constructed in a good and substantial manner and completed within two years herefrom."

"Whenever and as often as there shall be expended by the railway company as aforesaid, $10,000 (in proof of which the certificate of the Engineer shall always be necessary, but not conclusive evidence), the party of the third part (the stakeholders) shall deliver to the railway or their contractor, ten of said bonds and so from time to time." Contract in record, p. 206.

And the stakeholders or depositaries simply covenant to discharge this duty.

This contract was kept and the bonds delivered in eight instalments, between May 9, 1870 and August 4, 1871; Record, pp. 201-204.

Our answer to the objection urged is

1. That here was no delegation by the commissioners to the stakeholders of a personal or incommunicable power or duty.

The contract and all its terms was agreed to and fixed by the Commissioners and reduced to writing. (Record, p. 204). It was reasonable that the stakeholder or depositary should be some person other than one of the parties to the contract. The Commissioners selected for this purpose residents of

the township and the sureties on their official bond —one being a son of one of the Commissioners.

This arrangement would not affect the bonds even if they were now in the hands of the Railway Company.

2. There is no fraud or illegality in this arrangement, and if in making it the Commissioners exceeded their powers, it is a matter wholly immaterial as against a purchaser or holder of the bonds.

It is at most an irregularity, not going to the question of power to issue the bonds.

3. The charge asked was so indefinite, that it could not safely or properly have been given to the jury.

We submit with confidence that the judgment below ought to be affirmed.

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